85-639

Supreme Court, U.S.
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No.

IN THE
SUPREME COUKT
OF UNITED STATES
October Term, 1985

DESERT OUTDOOR
ADVERTISING, INC.,

Petitioner,

vs.

NAEGELE OUTDOOR ADVERTISING
CO. OF CALIFORNIA, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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QUESTIONS PRESENTED

1. Do the provisions of the "Highway Beautification Act of 1965, ('Act') 23 U.S.C. §§ 131, 136 and 319; Pub.L. 89-285, Title I, Sect. 101, Oct. 22, 1965, 79 Stat. 1028 extend to all lands adjecent to the Interstate Highway System and the primary system including 'Indian Reservations'?"

2. If so, does the 'Act' provide for the States to enforce its provisions on all lands adjacent to the Interstate Highway system and primary system including "Indian Reservations?"

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I

JURISDICTION

The opinion of the Supreme Court of California was filed on May 2, 1985. A timely petition for rehearing en banc was denied on July 10, 1985, and this petition for certiorari was filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C § 1257(3).

II

STATUTES INVOLVED

The pertinent Federal statutes involved are public law 89-285, codified as 23 U.S.C. §§ 131, 136 and 319 as amended, referred to as the "Highway Beautification Act of 1965."

The pertinent State provisions involved are California Business & Professions Code 5200 et seq., referred to as the "Outdoor Advertising Act."

III

STATEMENT OF THE CASE

The Morongo band of Mission Indians (Band) is a federally recognized Indian tribe, and is the beneficial owner of the Morongo Indian Reservation, consisting of approximately 32,300 acres of land located in Riverside County, California. The United States holds the land ". . . in trust for the sole use and benefit of the said Morongo Band or Village of Indians, according to the laws of California . . .".

The reservation lies astride a narrow pass between the San Bernardino and San Jacinto Mountain Ranges. A relatively few acres lie adjacent to Interstate Highway 10, connecting Los Angeles to popular Southern California desert communities.

Upon determining that a substantial source of revenue could be realized from outdoor advertising, the Band's general membership delegated to its Tribal Council authority to negotiate agreements for an outdoor commercial advertising business.

The Band leased some of this reservation land to non-Indian firms who operated billboards there until 1977. In 1977 the Band solicited proposals for further leases from several non-Indian firms including Naegele Outdoor Advertising Company of California, Inc. (Naegele-Respondent). Naegele's bid was selected and a lease agreement followed.

Pursuant to title 25 of the United States Code, the Department of the Interior must approve such leases before they become effective. (25 U.S.C. § 415). Upon submission, approval was denied because the designed purpose, in the Department's opinion, would violate the California Outdoor Advertising Act (Bus. & Prof. Code, § 5200 et seq.). Appeal was taken to the Interior Board of Indian Appeals, which resulted in the Interior Department's reversing its opinion concerning the applicability of the Highway Beautification Act. (*Administrative Appeal of the Morongo Band of Mission Indians v. Area Director, Sacramento Area Office* (1979) (86 I. D. 680).

During the pendency of the Interior appeal, on March 30, 1978, the Band entered into an agency agreement with Naegele. It provided for the installation, construction, operation and maintenance of 15 outdoor advertising structures located on reservation land. All billboards were placed so as to be viewed from the Interstate Highway 10 and contained commercial messages. On June 27, 1978, the California Department of Transportation (department) notified Naegele of its intention to apply and enforce California's Outdoor Advertising Act, to control outdoor advertising consistent with state and federal law concerned with environmental, aesthetic and safety purposes.

Despite the department's warning that the displays would violate the Outdoor Advertising Act, 16 billboards were erected on reservation land. The state outdoor advertising inspector ultimatley issued citations for all 16 displays.

On July 10, 1978, the People of the State of California, acting by and through the Department of Transportation filed a complaint and motion for preliminary and permanent injuction against Naegele. The complaint alleged Naegele was in control of 16 non-complying outdoor advertising structures located adjacent to Interstate Route 10 in Riverside County. These structures were alleged and found in violation of California's Outdoor Advertising Act and the federal Highway Beautification Act. The California Department of Transportation identified these displays as public nuisance within the meaning of the California Act.

A preliminary injunction was granted on August 1, 1978. On November 6, 1981, in accordance with the department's motion, a summary judgment resulted.

The within action for which Petitioner herein seeks the Writ of Certiorari was filed on June 26, 1980, for unfair competition, intentional interference with prospective economic benefit, and negligent interference with prospective economic benefit. On December 12, 1980, Naegele's demurrer was sustained to Desert's nuisance cause of action, the Court dismissed Desert's intentional interference with prospective economic benefit causes of action but granted Desert's motion for summary judgment on its unfair competition cause of action.

Accordingly, the Court enjoined Naegele from maintaining advertising structures on the reservation without complying with California's Outdoor Advertising Act.

Naegele was ordered to remove all non-complying structures.

The trial court consolidated the California Department of Transportation's action with Desert's action against Naegele. The consolidation was carried through the Supreme Court of California. The Court of Appeals affirmed the trial court (Appendix A), the Supreme Court of California reversed (Appendix B), and denied a rehearing (Appendix C).

Your Petitioner herein is informed that the California Department of Transportation is petitioning this Court for a Writ of Certiorari. In an effort to minimize judicial effort, this Petition should be consolidated with that of the Department of Transportation.

REASONS FOR GRANTING THE WRIT.

A. THE HIGHWAY BEAUTIFICATION ACT OF 1965 ("ACT") APPLIES TO INDIAN RESERVATIONS ADJACENT TO THE INTERSTATE HIGHWAY SYSTEM AND THE PRIMARY SYSTEM.

It was the declared intention of Congress in the Act, Title 23, Section 131(a) that the erection and maintenance of outdoor advertising signs adjacent to the Interstate System and the primary system be controlled to protect the public investment, promote safety, preserve natural beauty and recreational value of public travel. Congress did not exempt from the prohibitions of the Act any portion or parcel of land adjacent to the Interstate and primary system. In fact, they did just the opposite.

Congress mandated in Section 131(h) that,

> "(h) All *public lands* or *reservations* of the United States which are adjacent to any portion of the Interstate System and the primary system shall be *controlled* in accordance with the provisions of this section and the national standards promulgated by the Secretary." (Emphasis added).

It was the intent of Congress to include "all public lands or reservations of the United States . . .".

23 U.S.C. Section 103(e)(i) designates the Interstate System within the United States and District of Columbia to not exceed 41,000 miles in total.

There is no doubt that Congress intended the Act to be uniformly applied to the entire system. Congress was well aware that Indian reservations abutted and were adjacent to the Interstate System and primary system in many areas of this country, yet, the legislative history, including committee hearings, reflect that Senators Holland and Randolph, who guided the legislation, intended uniform and not checkerboarded or spotty application.

> "Mr. Cooper: 'First, this is a national program . . . I do not consider this bill to be based on voluntary compliance . . . no state could refuse to accept the program . . . I doubt if any bill has ever been passed which allowed the federal government to prescribe a program for the whole nation . . . and then fix a penalty on the states . . .' *Congressional Record* Vol. III, Part 18, 89th Cong. 1st Sess., pgs. 23796-23799.
>
> "Mr. Holland: 'My first question is this: Will the Senator indicate for the record the precise mileage of highways proposed to be covered by the bill? I understand that the present Interstate system is

authorized at 41,000 miles. I understand that the whole of that mileage is proposed to be covered, whether presently existing or to be contemplated in the future. Is that correct?

"Mr. Randolph: 'The Senator is correct. There is 41,000 miles of Interstate Highways designated to be covered under the provisions of the pending bill.' *Congressional Record*. Vol. III, Part 18, 89th Cong. 1st Sess., at pg. 23874."

That Indian reservations were intended to be included within the meaning of "all public lands or reservations . . . " was made known during the Floor Debates and Committee Hearings, by those who opposed the passage of the Act as follows:

"Mr. Cramer: 'I was in South Dakota a few years ago . . . We were directed along the highways to those places which visitors want to see, such as . . . the buffalo sanctuary, the Indian reservations, Mt. Rushmore . . . What is going to happen to the average tourist if this bill is enacted, sofar as being able to enjoy these things?' *1965 Hearings Before House Subcommittee on Roads on H.R. 8487 and Related Bills, at pg. 357.*

'Mr. Mundt: 'Mr. President, I oppose the proposal . . . tourists rely, in large part, upon highway signs . . . Let me cite a couple of illustrations. A great many tourists who travel through South Dakota like to stop and visit our Sioux Indian Reservations . . . South Dakota has at least five great Indian reservations . . . Our fine Indian citizens encourage the people . . . to stop and get acquainted with Indian ways . . . but there is no way in the world that tourists who desire to

take advantage of such opportunities can do so unless it is by signs directing them off a highway to a reservation . . .'. *Congressional Record*, Vol. III, Part 18, 89th Cong., 1st Sess., at pg. 24123.

'My sole concern is . . . application of the Act to 'all public lands or reservations' . . . If it is intended that this provision should apply to all land owned by the Federal Government, it appears reasonable . . . The term 'public lands' usually denotes a . . . part of the public domain of the United States. Actually, this type of regulation of use should apply equally to all lands owned by the Federal Government regardless of whether they are public or acquired lands . . . Likewise, the term 'reservations' has an indefinite meaning . . . If . . . it is intended to cover, for example, Indian reservations, it should be kept in mind that such reservations are not owned by the United States but are rather held in trust by the United States for the various Indian tribes.' [suggesting an alternative phraseology, to exclude Indian reservations, not adopted by the Committee] Statement of Wayne N. Aspinall, Representative from Colorado, 1965 House of Hearings Before Subcommittee on Roads, on H. R. 8487 and Related Bills, at pgs. 217 218."

On April 17, 1967, the Associate Solicitor for Indian Affairs rendered an opinion to the United States Department of the Interior #M-36703 that the Highway Beautification Act of 1965 applies to Indian reservation lands. It was stated therein that Interior's file contained nothing to indicate that Indian lands were regarded as

excluded from the operation of the Act and noting that, at the time of passage, Congress consulted with both Interior and the Bureau of Indian Affairs, who supported the legislation at the time of passage.

B. THE ACT PROVIDES FOR THE SEVERAL STATES TO ENFORCE ITS PROVISIONS ON ALL LANDS ADJACENT TO THE INTERSTATE SYSTEM AND PRIMARY SYSTEM INCLUDING "INDIAN RESERVATIONS."

The California Supreme Court misinterpreted the Congressional policy set forth in the Highway Beautification Act of 1965, when they said:

> "We therefore conclude that, even if Congress intended the Outdoor Advertising Standards of the Highway Beautification Act to apply on Indian reservations, it did not intend that these standards be enforced through the assertion of the state power. Thus, we reject the Department's argument that the Highway Beautification Act authorizes State regulation of outdoor advertizing on Indian reservation lands".

The philosophy of the Congress can only be understood by resorting to the entire Federal Aid Highway Act of 1958 (72 Stat 767). In 1958 the Congress passed the initial Highway Beautification Act (former Section-131) and gave the states one-half of one percent of the gross highway expenditures if they agreed to comply therewith. That Act declared it "to be in the public interest to *encourage* and *assist* the States to control the use of and to improve areas

adjacent to the Interstate System . . . " (former Section 23 U.S.C. 131(a)). (Emphasis added).

Former Section 131(d) read as follows:

> "(d) Whenever any portion of the Interstate System is located upon or adjacent to any public lands or reservations of the United States, the Secretary of Commerce may make such agreements with the agency having jurisdiction over such lands or reservations as may be necessary to carry out the national policy set forth in subsection (a) of this section, and any such agency is authorized and directed to cooperate fully with the Secretary of Commerce in this connection."

Hence, the philosophy of the 1958 Act was to set national standards for highway beautification and seek the aid of the States by enlisting them to obtain uniformity in areas of State control. Whenever the State lacked jurisdiction to bring about a change, such as public lands and reservations, the Secretary of Commerce was to enter into agreements with the various agencies having jurisdiction and those agencies were "directed" to cooperate fully with the Secretary of Commerce to carry out the national policy.

Whether one-half of one percent of the gross highway expenditures was insufficient to create the proper result, or insufficient cooperation of the Federal Agencies with the Secretary of Commerce, or whatever be the reason, Congress changed its entire philosophy and enacted a new policy in the manner in which it approached the problem in the Highway Beautification Act of 1965.

In that Act, which we are concerned with herein, the Congress decided that the national standards would be set by the Secretary of Transportation in areas outside of urban areas and by agreement between the several States and the

Secretary in urban areas. That "enforcement" of the Act would be left to the States since Congress omitted any direction to other agencies to cooperate with commerce to carry out the "national policy". Thus, the Congress sought to draw the distinction between the applicable standards governing billboard advertisement on Interstate and primary highways on the one hand and enforcement of those standards on the other hand.

23 U.S.C. 131(a) declares the policy of the 1965 Act. It states that erection and maintenance of outdoor advertising, signs, etc., in areas adjacent to the Interstate and primary system "should be *controlled* in order to protect the public investment . . ., promote the safety . . . and to preserve natural beauty; (Emphasis added). Thus, instead of the policy being to "assist the States to control" the policy now becomes a single centralized control.

23 U.S.C. 131(b) deducts 10% of Federal Highway Aid to any State which the Secretary determines has not made provision for "effective control" of the erection and maintenance along the Interstate and primary system of outdoor advertising signs, etc.. Thus, the policy is a single control to protect the public interest and any State not making provision to effect such control loses a substantial portion of its Highway Aid. It will further be noted that the detriment to the State for not going along with the Federal policy is twenty times that of the 1958 Act.

23 U.S.C. 131(c) defines "effective control" as the removal of all billboard commercial advertising signs within 660 feet ofthe right of way and those visible to travellers on the right of way beyond 660 feet, excepting;

(1) Directional and official signs including scenic historical, natural wonders, etc.;

(2) Signs or displays advertising the sale of the property on which they are located;

(3) Signs, displays, etc., advertising activities conducted on the property on which they are located;

(4) Landmark signs, and signs of historic or artistic significance as determined by the Secretary of Transportation; and

(5) Signs or displays by non-profit organizations for free coffee to travellers.

23 U.S.C. 131(c) is applicable in areas "outside of urban areas". It provides that the Secretary of Transportation be authorized to promulgate national standards in (1) and (4), supra. Hence, if a State does not enforce the provisions of 23 U.S.C. 131(c), it loses 10% of its Highway budget. Therefore, it is practically mandatory on the State of California, through it's Department of Transportation to enforce the Secretary's promulgated standards on the Indian reservation.

23 C. F. R. Section 750705 defines effective control as follows:

"In order to provide effective control of outdoor advertising, the State *must*:

(a) . . .
(b) . . .
(c) . . .
(d) Remove illegal signs expeditiously;
(e) . . .
(f) . . .
(g) . . .
(h) . . .

> (i) Establish enforcement procedures sufficient to discover illegally erected or maintained signs shortly after such occurrance and cause their prompt removal; and . . ."
> (Emphasis added).

23 U.S.C. 131(d) refers to areas zoned industrial or commercial or unzoned commercial or industrial areas. In such areas over which the State has power, its zoning determination will be accepted for purposes of the Act. In areas which are unzoned commercial or industrial, as well as the former areas zoned by the State, both the State and the Secretary, by agreement, will determine the signs, displays, etc., their size, lettering and spacing in accordance with customary usage.

Hence, the standards are set by agreement between the States and the Secretary of Transportation. "Effective control" or enforcement is left in the hands of the States.

23 U.S.C. 131(j) provides that any State Highway Department which has an agreement with the Secretary in effect on June 30, 1965, to *control* the erection and maintenance of outdoor advertising signs adjacent to the Interstate System, shall be entitled to recieve bonus payments set forth in the agreement but shall not be entitled to same unless the State maintains *control* required under the agreement. In order to make clear that an agreement entered into on or before June 30, 1965, did not satisfy the requirements of 23 U.S.C. 131(a) (b) and (c), so as to save the 10% deduction for the State, the last sentence of 23 U.S.C. 131(j) reads as follows:

> "The provisions of this subsection shall not be construed to exempt any State from *controlling* outdoor advertising as otherwise provided in this section". (Emphasis added).

Petitioner verily asserts that Congress intended the Beautification Standards be set either by the Federal Government or the Federal Government in cooperation with the State Government. The "effective control" in the "Act" means enforcement and the States' reward for such enforcement is not losing 10% of its Highway Aid Funds.

C. FEDERAL PREEMPTION IS NOT RELEVANT

1. THE STATES ARE REQUIRED TO ENFORCE THE "ACT".

This case involves federal "authorization and direction" to the States that make provision for "effective control" of the erection and maintenance of advertising along the Interstate and primary highway system. The court below erred when it stated that Congress intended to maintain the same enforcement mechanism it had developed in the 1958 law. The California Supreme Court, in support of that proposition cites regulations promulgated by the Secretary of Interior for the issuance of permits for outdoor advertising on public lands under the jurisdiction of the Bureau of Land Management and cites *Ryan Outdoor Advertising, Inc., v. United States* (9th Cir. 1977) 559 F.2d 554. That case holds that when the Congress has authorized the (federal) Department of Transportation to set general standards on outdoor advertising which apply to public lands other departments must abide thereby. What it means is that;

> "If the Secretary of the Interior chooses to permit signs on public lands, they are to conform to the standards set by the Department of Transportation under the Highway Beautification Act. But if

> the Secretary of the Interior, in the exercise of his authority over federal lands, decides that no outdoor advertising will be permitted on public lands whatsoever, the Highway Beautification Act simply does not apply." p. 557.

Petitioner herein advocates that the "Highway Beautification Act of 1965" contains within it the formula for determining what will and what will not be permitted advertising adjacent to Interstate and primary highways. Some of these standards are set by the Secretary of Transportation, outside of urban areas, and by the Secretary in cooperation with the States, by agreement, in urban areas zoned commercial and industrial. All *RYAN* teaches us is that all Department's Regulations having jurisdiction over Public Land and Reservations are required to conform to the standards of the Department of Transportation concerning Highway Beautification.

Petitioner is urging that enforcement of these standards has been "authorized and directed" by 23 U.S.C. 131(b) through enactment of State Laws, i.e., California Business and Professions Code 5200 et seq..

2. THE DELEGATION TO ENFORCE THE HIGHWAY BEAUTIFICATION FROM CONGRESS TO THE STATES IS CLEAR AND UNAMBIGUOUS.

The court below erred in two further respects. That Court held that where Congress authorizes state regulation on an Indian reservation that the mandate must be clear and unambiguous.

(a) The authorization herein was not for regulation but rather for enforcement. Regulation is the right to set standards which may vary. That can only be accomplished by the Secretary of Transportation or the Secretary in agreement with the States, 23 U.S.C. 131 which provides for Federal Regulation.

(b) The *authorization* for state enforcement was more in the nature of a "direction, order or command" to maintain "effective control" or lose 10% of their Highway apportionment. By shrinking the State's apportionment in an amount twenty times that of the 1958 Act Congress has created a "clear and unambiguous" mandate.

(c) The Supreme Court of California erred further in assuming that the States could not achieve compliance on Indian reservation land since the land is not subject to State powers of eminent domain and the States are not authorized to enforce their land-use regulations on Indian reservations. Additionally, Indian tribes are immune from suit in the absence of a waiver of sovereign immunity.

23 U.S.C. 131(g) determines the compensation to be paid for sign removal as follows:

"(g) Just compensation shall be paid upon the removal of any outdoor advertising sign, display, or device lawfully erected under State law and not permitted under subsection (c) of this section, whether or not removed pursuant to or because of this section. The Federal share of such compensation shall be 75 per centum. Such compensation shall be paid for the following:

(A) The taking from the owner such sign, display, or device of all right, title, leasehold, and interest in such sign, display, or device; and

(B) The taking from the owner of the real property on which the sign, display, or device is located, of the right to erect and maintain such signs, displays and devices thereon."

(1) There is no condemnation of lands required for sign removal, just merely removing the sign. The Morongo Band still has its reservation — they just won't have the signs.

(2) As to zoning 23 U.S.C. 131(d) provides for State zoning where the areas adjacent to the Interstate and primary system are under authority of State Law and zoning by agreement between the Secretary and "the Several States" "in unzoned commercial or industrial areas." All other areas located outside of urban areas are governed by 23 U.S.C. 131(c). Hence, the Congress covered all zoned, unzoned and to be zoned areas including Indian reservations.

(3) Sovereign Immunity. The California Supreme Court felt that without a waiver of sovereign immunity the States could not enforce the Act against Indian tribes.

Section 5461 of the California Business and Professions Code make non-conforming advertising displays a nuisance; Section 5464 makes violation of these provisions a misdemeanor. Hence, enforcement is obtained through the State's penal provisions.

D. NO RATIONAL RELATIONSHIP EXISTS BETWEEN THE HIGHWAY BEAUTIFICATION ACT AND THE RIGHT OF RESERVATION INDIANS TO MAKE THEIR OWN LAWS AND BE RULED BY THEM.

No doubt that Congress has broad power to regulate tribal affairs under the Indian Commerce Clause, U.S. Const. Art. 1, Sect. 8, Cl. 3. *United States v. Wheeler* 435 U.S. 313, 322-323, 98 S.Ct. at 1085-1086 (1978).

Does the Highway Beautification Act unlawfully infringe "on the right of reservation Indians to make their own laws and be ruled by them?" *Williams v. Lee*, 358 U.S. 217, 220, 79 S.Ct. 269, 271, 3 L.Ed.2d 251 (1959).

> "The right of tribal self-government is ultimately dependent on and subject to the broad power of Congress. Even so, traditional notions of Indian Self-government are so deeply engrained in our jurisprudence that they have provided an important 'backdrop'. *McClanahan v. Arizona Tax Commission*, supra, at 172, 93 S. C., at 1262 against which vague or ambiguous federal enactments must always be measured." *White Mountain Apache Tribe v. Bracker* 448 U.S. 136, 143, 100 S.Ct. 22578, 2583 (1980).

We are dealing here with a unique situation. Does 23 U.S.C. 131 require compliance by Indian Reservations adjacent to the Interstate and primary highway system and if so, does 23 U.S.C. 131 by its provisions direct the State to enforce that compliance?

Most of the matters dealt with by this Court involved State enforcement of State laws which were not enacted in

cooperation with and under Federal compulsion as was the Highway Beautification Act of 1965.

In this case the issue is whether the Federal Law, 23 U.S.C. 131, is so vague or ambiguous so as to require it to be measured against the "backdrop" provided in our heritage by the traditional notions of Indian Self-government. This tradition includes the firm Federal policy of "promoting tribal self-sufficiency and economic development". *White Mountain Apache Tribe v. Bracker*, supra, p. 144.

Here we assert authority over the conduct of non-Indians engaging in activity on the reservation. Because of the substantive subject matter it should make no difference whether we are dealing with Indians or non-Indians.

Here the exercise by State authority enforces Federal Law rather than violates it. The remaining issue is whether the Federal Law (23 U.S.C. 131) is so vague and ambiguous that the presumption in favor of Indians carry the day. *Bryan v. Itasca County* (1976) 426 U.S. 373, 96 S.Ct. 2102, 48 L.Ed.2d 710.

Generally, the Act (23 U.S.C. 131) seeks to make safe, beautify and promote the recreational value of the public highways in the United States.

The Act refers to the Interstate System and the primary system (23 U.S.C. 131(b) and includes "All public lands on reservations of the United States" (23 U.S.C. 131(h)) making no exception for Indian reservations. It would torture the language to write in an exception.

Nevertheless, what is the relationship between maintaining advertising billboards on Indian reservations in violation of 23 U.S.C. 131 and Indian government, self-determination, self-sufficiency and economic development?

1. The billboards are advertising the sale of commercial products. They are not landmark signs, historic signs or of historic significance. They do not provide information in the specific interest of the traveling public, such as directional information.

It is difficult to believe that Congress intended to beautify the Interstate and primary highway system while leaving those highways adjacent to Indian Reservations in their distressed condition.

It is difficult to believe that Congress intended to make safe all Interstate and primary highways while leaving those highways adjacent to Indian reservations in their prior unsafe condition.

2. The advertising billboards face the highways and can only be seen by the passerby travelling public. In *Rice v. Rehner*, __U.S__, 103 S.Ct. 3291, 3298 (1938) this Court paid particular attention to the off-reservation effect of the activity. In that case, dealing with liquor licenses this Court stated at p. 3298:

"Liquor sold by Rehner to other Pala Tribal members or to non-members can easily find its way out of the reservation and into the hands of those whom, for whatever reason, the State does not wish to possess alcoholic beverages, or to possess them through a distribution network over which the State has no control. This particular 'spillover' effect is qualitatively different from any 'spillover' effects of income taxes or taxes on cigarettes. 'A State's regulatory interest will be particularly substantial if the State can point to off-reservation effects that necessitate State

intervention'. *New Mexico v. Mescalero Apache Tribe*, __U.S__, __, 1035 S.Ct. 2378, 2387, 75 L.Ed.2d__ (1983)".

The "spillover" as to billboards is total. They have no effect on the reservation in fact, they can only be viewed, as to their commercial message, from the Highways. Their entire impact is off the reservation.

3. Petitioner finds no assertion of any tradition of tribal immunity that may be repealed only by an explicit directive from Congress. Petitioner is not aware of traditional placing of commercial signs advertising products to passers by on Indian Reservations. Petitioner cannot find any rational relationship between placement of such signs and the Indians right to self-government or self-determination.

While the placement of such signs does produce revenue for the tribe it does not give rise to any economic development in the sense that it creates employment in an industrious effort where the Indian is perfecting skills, producing commodities and developing an enterprise. If self-sufficiency means developing one's talents, skills and ability, billboard signs won't help.

4. The Highway Beautification Act of 1965 is so all inclusive in its application to the entire country that it leaves no room for checker-board exceptions such as Indian reservations. Had the Indian reservations been advertising historic or scenic incidents or events, respondent's position could be understood. But, when the advertisement

contains exactly that commercial message which the statute condemns, then it must fail.

CONCLUSION

It is for these reasons that we ask the Court to grant this Petition.

DATED: September 30, 1985

Respectfully submitted,

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APPENDIX A

COPY

SUPREME COURT
FILED
MAY 2, 1985
LAURENCE P. GILL, Clerk

Deputy

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

**THE PEOPLE ex rel.
DEPARTMENT OF
TRANSPORTATION,**
Plaintiff and Respondent,
v.
L.A. 31911
(Super. Ct. No. 126069)
**NAEGELE OUTDOOR
ADVERTISING COMPANY
OF CALIFORNIA, INC.,**
Defendant and Appellant.

**DESERT OUTDOOR
ADVERTISING, INC.,**
Plaintiff and Respondent,
v.
(Super. Ct. No. 137500)
**NAEGELE OUTDOOR ADVERTISING
COMPANY OF CALIFORNIA, INC.,**
Defendant and Appellant.

This case presents the question whether the State of California may regulate billboards on Indian reservations. Upon examination of the statutes, legislative history, and precedents involved, we conclude that the state's regulatory authority is preempted by federal law.

This consolidated appeal stems from two separate judgments entered after the trial court granted each plaintiff's motion for summary judgment. Both cases, tried separately below, raise substantially the same issues and involve the same defendant. Because resolution of these issues will have significant effect on the Morongo Band of Mission Indians, its request to file a brief amicus curiae was granted.

The Morongo Band of Mission Indians (Band) is a federally recognized Indian tribe, and is the beneficial owner of the Morongo Indian Reservation, consisting of approximately 32,300 acres of land located in Riverside County, California. The Morongo Indian Reservation was created by a series of seven executive orders of various Presidents of the United States, one presidential proclamation, one federal statute, and one deed, beginning in 1876 and ending in 1948. Under Patent Number 172786, the United States declared it will hold the said tracts of land ". . . in trust for the sole use and benefit of the said Morongo Band or Village of Indians, according to the laws of California . . . ."

The reservation lies astride a narrow pass between the San Bernardino and San Jacinto Mountain Ranges. As a result only a small portion of the land is located on the plain suitable for economic development. These relatively few acres lie adjacent to Interstate Highway 10, connecting Los

Angeles to popular Southern California desert communities.

In addition to the interstate highway, the reservation is crossed by a main line of the Southern Pacific Railroad, the Colorado River Aqueduct, major oil transmission pipelines, natural gas pipelines, and numerous electrical transmission lines, all of which serve the metropolitan Los Angeles area without any significant benefit to the reservation or its residents. The reservation's few natural resources yield little income so that, despite the Band's apparent advantageous location, its economy is depressed. Many of its members are unemployed and live in poverty.

For many years, the Band has derived a major part of its income from outdoor advertising activities. The Band's general membership has determined that the highest and best use of reservation land adjacent to Interstate 10 is for outdoor adversiting. In a 1977 appraisal report, the Southern California Appraisal Office of the Bureau of Indian Affairs came to the same conclusion.

Accordingly, the Band's general membership delegated to its tribal council authority to negotiate agreements for an outdoor advertising business. The Band leased some of this reservation land to non-Indian firms who operated billboards there until 1977. In 1977 the Band solicited proposals for further leases from several non-Indian firms including Naegele Outdoor Advertising Company of California, Inc. (Naegele) and Desert Outdoor Advertising, Inc. (Desert). Naegele's bid was selected and a lease agreement followed.

Pursuant to title 25 of the United States Code, the Department of the Interior (Interior) must approve such leases before they become effective. (25 U.S.C. § 415.) Upon submission, approval was denied because the lease's

purpose, in the Sacramento area director's opinion, would have violated the Highway Beautification Act (23 U.S.C. § 131 et seq.) and California's Outdoor Advertising Act (Bus. & Prof. Code, § 5200 et seq.). The Band appealed this decision and the Interior Board of Indian Affairs reversed. In its opinion, the board concluded that the provisions of the Highway Beautification Act do not apply to Indian reservations and that California's Outdoor Advertising Act cannot be enforced on tribal Indian lands. (Administrative Appeal of the Morongo Band of Mission Indians v. Area Director, Sacramento Area Office (1979) 86 Interior Dec. 680 (Admin. Appeal).)

During the pendency of the Interior appeal, on March 30, 1978, the Band entered into an agency agreement[1] with Naegele. This agreement provided for the installation, construction, operation and maintenance of 15 outdoor advertising structures located on reservation land. On June 27, 1978, the California Department of Transportation (Department) notified Naegele of its intention to apply and enforce California's Outdoor Advertising Act.

Despite the Department's warning and the implication that the displays would violate the Outdoor Advertising Act, 16 billboards were erected on reservation land. The state outdoor advertising inspector ultimately issued citations for all 16 displays.

On July 10, 1978, the People of the State of California, acting by and through the Department, filed a complaint and motion for preliminary and permanent injunction against Naegele. The complaint alleged Naegele was in control of 16 outdoor advertising structures located

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[1] We take judicial notice of the fact that this agency agreement was approved on or about February 2, 1984, by the Bureau of Indian Affairs.

adjacent to Interstate Highway 10 in Riverside County. These structures were in violation of section 5350 of the Business and Professions Code, requiring display permits. Additionally these displays were situated in violation of various provisions of the Outdoor Advertising Act. The Department identified these displays as a public nuisance within the meaning of Business and Professions Code section 5461.

The preliminary injunction was granted on August 1, 1978. And, on November 6, 1981, in accordance with the Department's motion, summary judgment resulted.

Desert's action, here consolidated with that of the Department, was initially filed on June 26, 1980. In its first amended complaint of December 12, 1980, Desert alleged causes of action for nuisance, unfair competition, intentional interference with prospective economic benefit and negligent interference with prospective economic benefit. Naegele's demurrer was sustained as to the nuisance cause of action. The court dismissed both causes of action for interference and granted Desert's motion for summary judgment on the unfair competition cause of action. In its order the court enjoined Naegele from maintaining advertising structures on the reservation without complying with the Outdoor Advertising Act. Naegele was ordered to remove all noncomplying structures. The enforcement of this judgment was stayed pending appeal.

The question we must answer on appeal is whether the Department can, through the Outdoor Advertising Act, regulate billboards erected on reservation land held in trust by the United States for the beneficial use of the Band. This inquiry requires us to consider several subsidiary questions.

In 1832, Chief Justice Marshall opined, with enviable clarity, that Indian tribes were wholly distinct nations

within whose boundaries "the laws of [a State] can have no force." (Worcester v. Georgia (1832) 6 Pet. 515, 561.) In the interim, however, the United States Supreme Court has departed from this view and acknowledged certain limitations upon tribal sovereignty. For example, " '[t]he sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and *is subject to complete defeasance.*' " (Rice v. Rehner (1983) __U.S__ [103] S.Ct. 3291, 3295], quoting United States v. Wheeler (1978) 435 U.S. 313, 323, with added emphasis.)

It is apparent that Congress may delegate its power over the governance of Indian reservations to the states. The Department argues that, in the context of outdoor advertising, Congress has done so through the Highway Beautification Act.

The Highway Beautification Act of 1965 was enacted to provide for scenic development and road beautification of the federal-aid highway systems. Title I of the act (23 U.S.C. § 131) contains requirements for the control of outdoor advertising.

In general, the act seeks to eliminate outdoor advertising displays within 660 feet of the edge of any interstate or federal primary system highway. Toward this end, the act mandates a 10 percent cut in federal-aid highway funds to any state which fails to provide for "effective control" over the erection and maintenance of such displays. (23 U.S.C. § 131(b).)

Title 23 United States Code Section 131(c) explains that "effective control" means that, with five specified content-

based exceptions none of which apply in this case, all such displays shall be banned.[2]

The act clearly contemplates that the states will achieve compliance through their inherent powers of zoning and condemnation. (23 U.S.C.§ 131(d) - (g).) The act also provides that, at the states' option, advertising displays may be permitted within 660 feet of interstate and federal highways within areas zoned industrial or commercial under state law. (23 U.S.C.§ 131(d).)

California complies with the Highway Beautification Act through its Outdoor Advertising Act (Bus. & Prof. Code, § 5200 et seq.). This act explicitly recognizes that outdoor advertising is a legitimate commercial use of property adjacent to roads and highways and provides that such advertising "should be allowed to exist in business areas." (*Id.*, § 5226.) The act also provides, however, that it is the policy of the state "to promote the public safety, health, welfare, convenience and enjoyment of public travel, to protect the public investment in such highways, to preserve the scenic beauty of lands bordering on such highways, and to insure that information in the specific interest of the

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[2] The act limits the content of such devices to five acceptable categories. Loosely defined, they are: (1) signs advertising scenic attractions, (2) signs advertising sale or lease of property upon which displays are located, (3) signs advertising activities conducted on the property on which displays are located, (4) landmark signs, and (5) signs advertising the distribution of free coffee to travelers. The signs in category 1 are to conform to standards regulating size, spacing, etc. "to be promulgated by the Secretary." (23 U.S.C. § 131(c).)

At the time of the enacment ofthe Highway Beautification Act in 1965, "the Secretary" was the Secretary of Commerce; in 1966, Congress created the Department of Transportation and all powers and duties under this act were transferred to the Secretary of Transportation (Pub. L. No.-89-670 (Oct. 15, 1966) 80 Stat. 931.)

traveling public is presented safely and effectively. . . ." (*Ibid.*)

The act then provides for restrictions upon outdoor advertising consonant with the provisions of the Highway Beautification Act. For example, outdoor advertisers must obtain permits before placing displays within 660 feet of the right-of-way of interstate and primary highways. (Bus. & Prof., Code, § 5350.) The content of allowable displays within this area is limited to the same categories as specified by the Highway Beautification Act. (*Id.*, § 5405.) Finally, certain safety measures involving size, spacing, and location are imposed. (*Id.*, §§ 5403, 5405, 5408.)

The Department contends that it may enforce the provisions of the Outdoor Advertising Act on Indian reservations because Congress expressly delegated such enforcement authority to the states through the Highway Beautification Act. Naegele and the Band, on the other hand, argue that this is a misinterpretation of the federal law.

Subdivision (h) of the federal act provides: "All public lands or reservations of the United States which are adjacent to any portion of the Interstate System and the primary system shall be controlled in accordance with the provisions of this section and the national standards promulgated by the Secretary." According to the Department, this provision clearly expresses Congress's intention to include Indian reservations under the provisions of the Highway Beautification Act and to give states the authority to enforce the act's provisions on Indian reservations.

Naegele and the Band argue that the phrase "public lands or reservations of the United States" was not intended to include Indian reservations. They find support for this view in the opinion of the Interior Board of Indian Appeals.

(Admin. Appeal, supra, 86 Interior Dec. 680.) The board examined the statute, concluded that it was ambiguous, and interpreted its ambiguities in favor of the Indians. On this basis it concluded that Congress did not intend the Highway Beautification Act to apply to Indian reservations.

The board's interpretation of the Highway Beautification Act is debatable (United States v. Portneuf-Marsh Valley Irr. Co. (E.D. Idaho 1913) 205 Fed. 416, 419, affd. (9th Cir. 1914) 213 F. 601, 603) but we need not resolve that debate here. Even assuming that the act was intended to apply to Indian reservations, it does not follow that Congress has authorized *state enforcement* of the act on such reservations, or indeed on any federal lands.

Several years before the enactment of the Highway Beautification Act, Congress made an earlier attempt to regulate outdoor advertising adjacent to federally funded highways. In 1958, Public Law No. 85-767 (72 Stats. 885, former 23 U.S.C. § 131) established standards similar to those of the later act and similarly relied upon the states for enforcement. This legislation provided that states which agreed to comply with federal outdoor advertising standards would be entitled to a one-half of 1 percent bonus in federal highway funding. The section of this law applicable to federal lands read: "Whenever any portion of the Interstate System is located upon or adjacent to any public lands or reservations of the United States, *the Secretary of Commerce may make such arrangements and enter into such agreements with the agency having jurisdiction over such lands or r servations as may be necessary to carry out the national policy* . . . , and any such agency is authorized and directed to cooperate fully with the Secretary of Commerce in this connection." (*Id.*, § 131(d), emphasis added.)

Thus the 1958 law clearly did not grant the states authority to enforce highway beautification provisions on federal lands and reservations. Rather, enforcement authority was reserved to the federal agencies having jurisdiction over such lands.

Desert argues that the fact that Congress did not repeat this language in the 1965 act is a clear indication that it wished to transfer enforcement authority over "public lands and reservations" from the federal agencies "having jurisdiction over such lands and reservations" to the states. We do not find this argument persuasive.

The House Report summarizing the legislataive intent of the Highway Beautification Act States "[section h] simply extends to all public lands and reservations of the United States which are adjacent to any portion of the Interstate System or the primary system *the same controls* covering other roads which are subject to this legislation." (1965 U.S. Code Cong. & Admin. News, p. 3717 (89th Cong., 1st Sess.), emphasis added.) This summary description could indicate that congress intended to maintain the same enforcement mechanism it had developed in the 1958 law. Thus, the act's standards (or "controls") would apply to all public lands and reservations of the United States. But, while the states would enforce these controls on state-owned and on private lands through their zoning and condemnation authority, federal agencies would enforce the controls on federal lands through their independent statutory authority over such lands.

Administrative and judicial interpretations of the Highway Beautification Act support this view.[3] In 1970, the

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[3] The earliest administrative interpretation of the act of which we are aware is a memorandum opinion from the Associate Solicitor for Indian

Secretary of the Interior promulgated regulations for the issuance of permits for outdoor advertising on public lands under the jurisdiction of the Bureau of Land Management. (Former 43 C.F.R. 2921.0-6.)[4] These regulations effectively prohibited the issuance of permits for outdoor advertising which would not have complied with the standards of the Highway Beautification Act.

In 1977, the Ninth Circuit upheld these Interior Department regulations against a challenge mounted by an outdoor advertising company in Nevada which asserted, inter alia, that Interior's authority to regulate in this area had been preempted by the Highway Beautification Act. (Ryan Outdoor Advertising, Inc. v. United States (9th Cir. 1977) 559 F.2d 554.) The court noted that Interior's authority to administer the laws dealing with federal lands both well established and "almost plenary." "The fact that Congress has authorized the [federal] Department of Transportation to *set general standards* on outdoor advertising which apply to public lands as well as to private does not preempt continued regulation of the same public lands by the Secretary of the Interior. . . . [¶] There is simply

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Affairs to the Commissioner of Indian Affairs, Department of the Interior, dated April 7, 1967. This opinion is consistent with our interpretation. Although the opinion concluded that Indian reservations "are subject to regulation under the [Highway Beautification] [A]ct," it did not address the issue of state authority to enforce the act's provisions on federally owned lands and did not suggest that state enforcement had been authorized by Congress.

[4] These regulations, specifically directed toward the issuance of permits for outdoor advertising, disappeared in a general reorganization and renumbering of the regulations which occurred in 1981. The new regulations, which discuss the leasing of public lands in more general terms, make no specific mention of outdoor advertising. (46 Fed. Reg. 5777 (Jan. 19, 1981) 43 C.F.R. 2920.0-1 et seq.)

no indication that Congress intended in the Highway Beautification Act the significant alteration of a persuasive, well-established regulatory scheme. . . ." (*Id.*, at p. 556, emphasis added.)

In addition, recent precedents in other contexts establish that congressional authorization of the state regulation on federal property will be found only where Congress's mandate is explicit. In a pair of cases, the United States Supreme Court has considered the question whether federal statutes mandating state pollution legislation have the effect of subjecting federal installations and activities located within the states to state regulation. The court concluded that "[b]ecause of the fundamental importance of the principles shielding federal installations and activities from regulation by the States, an authorization of state regulation is found only when and to the extent that there is 'a clear congressional mandate,' 'specific congressional action' that makes this authorization of state regulation 'clear and unambiguous.' " (Hancock v. Train (1976) 426 U.S. 167, 179, fns. omitted; see also EPA v. State Water Resources Control Board (1976) 426 U.S. 200.) These cases suggest that congressional authorization of state regulatory action on reservation land held in trust by the United States for the beneficial use of reservation Indians should require a similarly clear and unambiguous mandate.[5] We discern no such explicit mandate in the Highway Beautification Act.

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[5] See also State of Washington v. Environmental Protection Agency (9th Cir. Feb. 6, 1985) __F.2d__ (CA No. 83-7763) upholding the EPA's conclusion that the federal section 6901 et seq., "does not give the state jurisdiction over Indian lands, and that states could possess such jurisdiction only through an express act of Congress or by treaty" even though Indian tribes are clearly regulated entities under RCRA and the act authorizes state regulation in lieu of the federal program.

Further, as noted above, the Highway Beautification Act contemplates that the states will achieve compliance through the use of their inherent powers of zoning and eminent domain. Yet tribally owned Indian reservation land is not subject to state powers of eminent domain (Minnesota v. United States (1939) 305 U.S. 382; United States v. 10.69 Acres of Land (9th Cir. 1970) 425 F.2d 317), and states are not authorized to enforce their land-use regulations on Indian reservations (Santa Rosa Band of Indians v. Kings County (9th Cir. 1975) 532 F.2d 655, cert. den. (1977) 429 U.S. 1038). Additionally, Indian tribes are immune from suit in the absence of an effective waiver or consent. (Puyallup Tribe v. Washington Game Dept. (1977) 433 U.S. 165, 172.) The Supreme Court has held that, while Congress can authorize suits against Indian Nations, a waiver of sovereign immunity cannot be implied but must be unequivocally expressed. (Santa Clara Pueblo v. Martinez (1978) 436 U.S. 49, 58.)[6]

It appears logically imperative that, had Congress intended the states to enforce the provisions of the Highway Beautification Act against nonconforming advertising displays located on Indian tribal lands, it would have empowered the relevant state authorities to condemn reservation lands, to regulate tribal land use, and to sue

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[6] In *Santa Clara Pueblo*, supra, 436 U.S. 49, the United States Supreme Court held that Congress's action in enacting the Indian Civil Rights Act of 1968 (25 U.S.C. §§ 1301-1303) which, in relevant part, provides that "[n]o Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws" (§ 1302(8)), could not be interpreted as an implicit waiver of the tribe's immunity from suit. The court concluded that such a waiver requires an "unequivocal expression of . . . legislative intent. . . ." (*Santa Clara Pueblo*, supra, 436 U.S. at p. 59.)

Indian tribes. No such authorization can be found in the Highway Beautification Act.

We therefore conclude that, even if Congress intended the outdoor advertising standards of the Highway Beautification Act to apply on Indian reservations, it did not intend that these standards be enforced through the assertion of state power. Thus, we reject the Department's argument that the Highway Beautification Act authorizes state regulation of outdoor advertising on Indian reservation lands.

Both the Department and Desert argue alternatively that the act of August 15, 1953 (Pub. L. No. 83-280, 67 Stat. 589 (commonly known as Public Law 280)) confers upon the State of California the authority to enforce its Outdoor Advertising Act on Indian reservation lands. This position is untenable.

Although section 4 of Public Law 280, codified at 28 United States Code section 1360, appears to provide that all state laws of general application are effective on Indian reservations within the specified states,[7] the law has not been so construed by the federal courts. In Bryan v. Itasca County (1976) 426 U.S. 373, the Supreme Court, reasoning that "the primary intent of § 4 was to grant jurisdiction

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[7] Section 4(a), as codified at 28 United States Code Section 1360(a) (1976), provides: "(a) Each of the States . . . listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed . . . to the same extent that such State . . . has jurisdiction over other civil causes of action, and those civil laws of such State . . . that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State . . .: . . . California . . . All Indian country within the State."

over private civil litigation involving reservation Indians in state court" (*id.*, at pp. 385), concluded that Public Law 280 did not give Minnesota the authority to tax the personal property of Indians living on a reservation. More recently, the Ninth Circuit concluded that Public Law 280 does not authorize the enforcement of state and county laws controlling the conduct of bingo games on Indian reservations in California. (Barona Group of Capitan Grande Band, etc. v. Duffy (9th Cir. 1982) 694 F.2d 1185.) The court noted: "The Supreme Court . . . has construed [section 4] to mean that states have jurisdiction *only* over private civil litigation involving reservation Indians in state court. [Citation.] Thus a state may not impose general civil/regulatory laws on the reservation." (*Id.*, at pp. 1187-1188, emphasis added.) Neither Desert nor the Department advances any convincing argument why we should diverge from the *Barona* court's conclusion. We therefore conclude that state enforcement of the Outdoor Advertising Act on Indian reservations is not authorized by Public Law 280.[8]

For these reasons we determine that Congress has not authorized state regulation of outdoor advertising on Indian reservations. This does not end our inquiry, however.

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[8] The Department also appears to argue that the Secretary of the Interior's notice supplementing 25 Code of Federal Regulations section 1.4, published at 30 Federal Register 8722 (July 2, 1965), provides an independent basis for its assertion of state regulatory authority over Indian lands. This notice, however, specifically provides: "Nothing contained in this notice shall be construed to in any way alter or limit the provisions of [Public Law 280]." In light of this proviso, we are satisfied that the Secretary's directive is merely an attempt to interpret the aims of Congress in enacting Public Law 280. As such, it should not be construed to endow the state with broader general regulatory authority over Indian lands than mandated by the congressional enactment.

The United States Supreme Court has observed that under certain circumstances a state may validly assert authority over on-reservation activities even in the absence of a congressional mandate to do so. (New Mexico v. Mescalero Apache Tribe (1983) __U.S__ [103 S.Ct. 2378, 2384-2385].) It may be argued that this is such a case.

The Department cites Rice v. Rehner (1983) 103 S.Ct. 3291, Puyallup Tribe v. Washington Game Dept. (1977) 433 U.S. 165, and Mescalero Apache Tribe v. Jones (1973) 411 U.S. 145, among others, as examples of cases in which state regulation of Indian activities has been found permissible. But these cases are inapposite.

In Rice v. Rehner, the court found that Congress had expressly provided for the application of state law. (*Rice*, supra, 103 S.Ct. 3291, 3302.) In Mescalero Apache Tribe v. Jones and Puyallup Tribe v. Washington Game Dept., the court scrutinized pertinent federal law and discerned no intent to preempt state authority. The situation is quite different here.

More than 10 years ago, the Supreme Court noted that, in the area of state regulation of tribal enterprises, generalizations have become treacherous. Nonetheless, amid the welter of decisions analyzing preemption in this unique context, the Supreme Court has recently reaffirmed that "a State will certainly be without jurisdiction if its authority is preempted under familiar principles of preemption . . ." (*New Mexico*, supra, 103 S.Ct. at p. 2386.)

Among these "familiar principles" is the following. Whether federal legislation preempts state law "is a matter of legislative intent. In ascertaining this intent, . . . the test . . . is whether the enforcement of law would conflict with the purposes of the federal legislation, whether by frustating an affirmative federal purpose or by interfering with a

matter intentionally left unregulated by Congress." (Loma Portal Civic Club v. American Airlines, Inc. (1964) 61 Cal.2d 582, 591.)

The Highway Beautification Act clearly represents Congress's intent to design a comprehensive scheme for the regulation of outdoor advertising adjacent to federal highways throughout the United States. In Interior's view, Congress intended to leave Indian reservation lands entirely unregulated under the act. In our opinion, Congress may have intended the act's provisions to apply on Indian reservations. But if so, it reserved to federal authorities the responsibility for enforcing the act's provisions upon federal lands and reservations. In either case, the assertion of the state regulatory authority in this area would clearly conflict with Congress's purposes, either by subjecting Indian enterprises exempt from control under the federal act to state regulation, or by imposing inconsistent state regulations in an area reserved for federal oversight.[9]

For this reason, we conclude that the state's regulatory authority in this area is preempted by the operation of federal law and the judgment in favor of the Department must be reversed.[10]

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[9] Interior's authority to supervise the enterprise at issue here cannot be doubted. Under 25 United States Code section 415(a) Indian lands may be leased for business purposes only "with the approval of the Secretary of the Interior." In accordance with this statutory authorization, the Secretary has issued extensive regulations pertinent to the leasing of Indian lands. (25 C.F.R. § 162 et seq.)

The record amply indicates that the Band's outdoor advertising enterprise has been encouraged and approved by the Bureau of Indian Affairs. By contrast the Department has presented evidence that every one of the 16 advertising displays involved here is in violation of substantive provisions of state law.

[10] With all due respect to our concurring colleague, we see little

Desert's judgment on the complaint of unfair competition must also be reversed.[11] This action is premised upon the language of Business and Professions Code section 17200 which defines "unfair competion" to include any "unlawful" business practice. Desert admits that if Naegele's conduct is not forbidden by law, there is no unfair competition. We have concluded that California law cannot be applied to regulate the billboards at issue. And, even if Naegele's conduct could somehow be construed as violative of federal law, state court injunctive relief under the theory of unfair competition is inappropriate.

A similar question was raised in Diaz v. Kay-Dix Ranch (1970) 9 Cal.App.3d 588. In that case, plaintiff migratory farmworkers sought an injunction prohibiting defendant ranch owners from knowingly employing illegal aliens. An action alleging unfair competition was brought under former Civil Code section 3369.

The court, while recognizing the farmworkers' need for protection, denied injunctive relief on the basis that federal action through the authority of the Immigration and Naturalization Service would be more efficacious than injunctive relief. "Plaintiffs seek the aid of equity because the national government has breached the commitment

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resemblance between this case and In re Wilson (1981) 30 Cal.3d 21, except for the fact that both involve Indians. The question in *Wilson* was "whether extinguishment of the [Pit River] tribe's Indian title to, or right to occupy, their aboriginal territory operated to extinguish the tribe's aboriginal hunting rights." (*Id.*, at p. 24.) No issue pertaining to regulation of activity on reservations, or of federal preemption, was involved.

[11] Desert initially filed a cross-appeal as to its three other causes of action. This cross-appeal was dismissed at Desert's request on March 8, 1983.

implied by national . . . policy. It is more orderly, more effectual, less burdensome to the affected interests, that the national government redeem its commitment. Thus the court of equity withholds its aid." (*Diaz*, supra, at p. 599.)

As discussed above, it is unclear whether the provisions of the Highway Beautification Act were intended to apply to outdoor advertising on Indian reservations at all. Even if this question were resolved in Desert's favor, however, we have concluded that Interior, rather than the Department, is the appropriate agency to enforce the act's provisions. The sound counsel of the *Diaz* decision, therefore, mandates state abstention in reliance upon federal enforcement in this case.

The summary judgments are reversed.[12]

GRODIN, J.

WE CONCUR:
BIRD, C.J.
KAUS, J.
BROUSSARD, J.
REYNOSO, J.
LUCAS, J.

SEE CONCURRING OPINION

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[12] Because we base our conclusion on grounds of federal preemption, we need not resolve the issue whether, as Naegele asserts, the lawsuits against it should be dismissed pursuant to Code of Civil Procedure section 389 on the basis that the Band is a necessary party which cannot be joined.

COPY

PEOPLE ex. rel. DEPARTMENT OF TRANSPORTATION v. NAEGELE OUTDOOR ADVERTISING COMPANY OF CALIFORNIA, INC.

L.A. 31911

CONCURRING OPINION BY MOSK, J.

I concur in the majority opinion.

In doing so, however, I wonder about the appearance of consistency when the court defers to *federal* control of Indian lands in a case involving billboards, after holding that traditional Indian hunting and fishing rights must yield to *state* control in a case involving fish and game laws. (In re Wilson (1981) 30 Cal.3d 21; but see dis. opn. by Mosk, J. and Newman, J., at p. 37 ff.)

To offer a more convincing rationale in the instant matter, and to provide a recognizable pattern in the law, we should take this opportunity to overrule *Wilson.*

MOSK, J.

PEOPLE ex rel. DEPARTMENT OF TRANSPORTATION v. NAEGELE OUTDOOR ADVERTISING COMPANY OF CALIFORNIA, INC., etc.

L.A. 31911

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TRIAL COURT & NO.:
Riverside County Superior Court
Nos. 126069, 137500
TRIAL JUDGE:
Honorable J. William Mortland

APPENDIX B

CERTIFIED FOR PUBLICATION

COURT OF APPEAL-FOURTH DIST.
FILED
FEB. 28, 1984
KEENAN G. CASADY, Clerk

Deputy Clerk

COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

**PEOPLE ex rel.
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4 Civil 27494
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COMPANY OF CALIFORNIA, INC., etc.,**

Defendant and Appellant.

OPINION

APPEAL from the Superior Court of Riverside County. J. William Mortland, Judge. Affirmed.

Best, Best & Krieger, Barton C. Gaut, Ronald J. Kohut and Richard Cross for Appellant Naegele Outdoor Advertising Company of California.

Art Bunce as Amicus Curiae of the Morongo Band of Mission Indians on behalf of Appellant.

Robert F. Carlson, Chief Counsel, Gordon S. Baca, Deputy Chief Counsel, William M. McMillan and Ruby A. Theophile, for Respondent People ex rel. Department of Transportation.

Maxwell, Wright & Wheeler and Sprague Wheeler for Respondent Desert Outdoor Advertising, Inc.

This consolidated appeal stems from two separate judgments entered after the trial court granted each plaintiff's motion for summary judgment. Both cases, tried separately below, raise substantially the same issues and involve the same defendant. Because a resolution of these issues will have a significant effect on the Morongo Band of Mission Indians, we granted its request to file a brief amicus curiae.

I

The Morongo Band of Mission Indians (Band) is a federally-recognized tribe, and is the beneficial owner of the Morongo Indian Reservation, consisting of approximately 32,300 acres of land located in Riverside County, California. The Morongo Indian Reservation was created

by a series of seven executive orders of various Presidents of the United States, one presidential proclamation, one federal statute, and one deed, beginning in 1876 and ending in 1948. Under Patent No. 172786, the United States declared it will hold the said tracts of land ". . . in trust for the sole use and benefit of the said Morongo Band or Village of Indians, according to the laws of California . . . ."

The reservation lies astride a narrow pass between the San Bernardino and San Jacinto Mountain Ranges. As a result only a small portion of the land is located on the plain suitable for economic development. These relatively few acres lie adjacent to Interstate Highway 10, connecting Los Angeles to popular Southern California desert communities. Upon determining that the highest and best use of this land was outdoor billboard advertising, the Band's general membership delegated to its Tribal Council authority to negotiate agreements for an outdoor advertising business.

According to the brief of Amicus Curiae, the Band leases some of this reservation land to non-Indian firms who operated billboards there until 1977. In 1977 the Band solicited proposals for further leases from several non-Indian firms including Naegele Outdoor Advertising Company of California, Inc. (Naegele) and Desert Outdoor Advertising, Inc. (Desert). Naegele's bid was selected and a lease agreement followed.

Pursuant to title 25 of the United States Code, the Department of the Interior must approve such leases before they become effective. (25 U.S.C., § 415.) Upon submission, approval was denied because the designed purpose, in the department's opinion, would violate the Highway Beautification Act (23 USC, § 131 et seq.) and California's Outdoor Advertising Act (Bus. &Prof. code, § 5200 et seq.).

Appeal was taken to the Interior Department's reversing its opinion concerning the applicability of the Highway Beautification Act. (*Administrative Appeal of the Morongo Band of Mission Indians v. Area Director, Sacramento Area Office* (1979) 86 I.D. 680.)

During the pendency of the Interior appeal, on March 30, 1978, the Band entered into an agency[1] agreement with Naegele. It provided for the installation, construction, operation and maintenance of 15 outdoor advertising structures located on reservation land. On June 27, 1978, the Department of Transportation (department) notified Naegele of its intention to apply and enforce California's Outdoor Advertising Act. In its brief the department expresses its philosophy of enforcement: "to control outdoor advertising consistent with state and federal law concern with environmental and aesthetic and safety purposes."

Despite the department's warning and implication that the displays would violate the Outdoor Advertising Act, 16 billboards were erected on reservation land. The state outdoor advertising inspector ultimately issued citations for all 16 displays.

On July 10, 1978, the People of the State of California, acting by and through the Department of Transportation filed a complaint and motion for preliminary and permanent injuction against Naegele. The complaint alleged Naegele was in control of 16 outdoor advertising structures located adjacent to Interstate Route 10 in Riverside County. These structures were in violation of section 5350 of the Business and Professions Code,

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[1] We take judicial notice of the fact that this agency agreement was approved on or about February 2, 1984, by the Bureau of Indian Affairs.

requiring display permits. Additionally these displays have been illegally situated in violation of various provisions of the Outdoor Advertising Act. The department identified these displays as a public nuisance within the meaning of Business and Professions Code section 5461.

The preliminary injunction was granted on August 1, 1978. And, on November 6, 1981, in accordance with the department's motion, summary judgment resulted.

The action consolidated with that of the Department of Transportation's was initially filed by Desert on June 26, 1980. In its first amended complaint of December 12, 1980, Desert alleged causes of action for nuisance, unfair competition, intentional interference with prospective economic benefit. Naegele's demurrer was sustained as to the nuisance cause of action. The court dismissed both causes of actions for interference and granted Desert's motion for summary judgment on the unfair competition cause of action. In its order the court enjoined Naegele from maintaining advertising structues on the reservation without complying with the Outdoor Advertising Act. Naegele was ordered to remove all non-complying structures. The enforcement of this judgment was stayed pending appeal to this court.

II

The Highway Beautification Act contains a particular section dedicated to the control of outdoor advertising. (23 U.S.C., § 131.) Congress has exhibited an intention of controlling outdoor advertising devices adjacent to the interstate highway system "in order to protect the public investment in such highways, to promote the safety and

recreational value of public travel, and to preserve natural beauty." (23 U.S.C., § 131, subd. (a).)

Congress has limited the content of outdoor advertising devices located adjacent to interstate highways. Five acceptable categories have been identified. Loosely defined, they are: (1) Scenic attractions; (2) sale or lease of property; (3) activities conducted on the property on which displays are located; (4) landmarks; and (5) offers of free coffee to travelers. (23 U.S.C., § 131, subd. (c).) The implementation of these limits has been left to the individual states by way of an incentive/punishment system concerning federal-aid highway funds. In 23 United States Code section 131, subdivision (b), Congress provides a state's allotment of federal highway funds shall be reduced by 10 percent for failure to implement "effective control" over outdoor advertising devices. "Effective control" is then defined in the following subdivision to mean the five limits as described above.

California complies with the Highway Beautification Act by its Outdoor Advertising Act, Business and Professions Code section 5200 et seq. The Outdoor Advertising Act's policy behind highway advertising display regulation is "to promote the public safety, health, welfare, convenience and enjoyment of public travel, to protect the public investment in such highways, to preserve the scenic beauty of lands bordering on such highways, and to insure that information in the specific interest of the traveling public is presented safely and effectively. . . ." (Bus. & Prof. Code, § 5226.)

Although outdoor advertising is recognized as a legitimate commercial use of property adjacent to highways (*id.*), several restrictions are imposed. First the advertiser must secure a permit prior to displaying the ad. (Bus. & Prof. Code, § 5350.) The code then limits the content of the

displays to "(1) [d]irectional or other official signs or notices that are required or authorized by law, including, but not limited to, signs pertaining to natural wonders, scenic and historical attractions . . . (2) . . . advertising the sale or lease of the property upon which [the displays] are located . . . (3) [those] which advertise the business conducted or services rendered or the goods produced or sold upon the property upon which the advertising display is placed. . . . (4) [m]essage center displays, provided they advertise the business conducted or services rendered or goods produced or sold upon the property upon which the display is placed. . . . (5) [those] erected or maintained pursuant to regulations of the director, and not inconsistent with the national policy set forth in subdivision (f)[2] of Section 131 of Title 23 of the United States Code and the standards promulgated thereunder by the Secretary of Transportation, and designed to give information in the specific interest of the traveling public." (Bus. & Prof. Code, § 5405.) Finally certain safety measures involving size, spacing and location are imposed. (Bus. & Prof. Code, §§ 5403, 5404, and 5408.)

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[2] 23 United States Code section 131, subdivision (f), provides:

"The Secretary shall, in consultation with the States, provide within the right-of-way for areas at appropriate distances from interchanges of the Interstate System, on which signs, displays, and devices giving specific information in the interest of the traveling public may be erected and maintained. The Secretary may also, in consultation with the States, provide within the rights-of-way of the primary system for areas in which signs, displays, and devices giving specific information in the interest of the traveling public may be erected and maintained. Such signs shall conform to national standards to be promulgated by the Secretary."

III

The lower court in both cases concluded the Outdoor Advertising Act was applicable in its summary judgment rulings. This appeal therefore raises the issue of whether the Outdoor Advertising Act applies to a non-Indian company acting pursuant to an agency agreement providing for the construction and maintenance of advertising display devices on reservation land held in trust by the United States for the beneficial use of the Morongo Band Mission Indians.

IV

The applicability of a statute is unquestionably an issue of law. (*Killian v. City and County of San Francisco* (1978) 77 Cal.App.3d 1, 7; 6 Witkin, Cal. Procedure (2d ed.) §§ 209-210, pp. 4200-4201.) As such the trial court properly resolved this question by way of summary judgment. Where there is no material issue of fact to be tried and the sole question remaining is one of law, it is the duty of the court to determine the issue of law. (*Angelus Chevrolet v. State of California* (1981) 115 Cal.App.3d 995, 1000; *Zahn v. Canadian Indem. Co.* (1976) 57 Cal.App.3d 509, 512; *Vincent v. State of California* (1971) 22 Cal.App.3d 566, 570.) As indicated below, the Outdoor Advertising Act's applicability hinges on a federal pre-emption approach. To complicate matters, that approach, as it applies to Indians, calls for a balancing of interests. Nevertheless, the main issue here is the applicability of a statute, which is a question of law — properly determined by the lower court.

V

A review of American history reveals the inconsistency with which the Indians have been treated. As the American pioneers forged westward, they in turn pushed the Indians into unexplored lands where they were free to govern themselves. However, continued American westward movement made it evident that the Indians could not be isolated forever. "[T]he United States [therefore] began to consider the Indians less foreign nations and more as a part of our country." (*Organized Village of Kake v. Egan* (1962) 369 U.S. 60, 72 [7 L.Ed.2d 573, 581; 82 S.Ct. 562].) Nevertheless, the Supreme Court committed the United States to a policy of leaving the Indians free from state jurisdiction. The Indian nations were "distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries which is not only acknowledged but guaranteed by the United States." (*Worcester v. The State of Georgia* (1832) 6 Pet. 515, 557 [8 L.Ed. 483, 499] overruled on other grounds in *Mescalero Apache Tribe v. Jones* (1973) 411 U.S. 145 [36 L.Ed.2d 114; 93 S.Ct. 1267].)

Worcester indicated the United States intended to deal with the Indians as sovereigns, however, since that time the Indian sovereignty doctrine has "undergone considerable evolution in response to changed circumstances." (*McClanahan v. Arizona Tax Commission* (1973) 411 U.S. 164, 171 [36 L.Ed.2d 129, 135; 93 S.Ct. 1257] overruled on other grounds in *Bryan v. Itasca County* (1976) 426 U.S. 373 [48 L.Ed.2d 710; 96 S.Ct. 2102.) For example where Indians have left the reservation, state laws have been held applicable to such individuals. (*Oklahoma Tax Com. v. United States* (1943) 319 U.S. 598 [87 L.Ed. 1612; 63 S.Ct.

1284].) And, under certain circumstances, a state may validly assert authority over the affairs of non-Indians on a reservation. *Washington v. Confederate Tribes* (1980) 447 U.S. 134 [65 L.Ed.2d 10; 100 S.Ct. 2069].) The continuing development of this doctrine proves "the relation of the Indian Tribes living within the borders of the United States . . . is an anomolous one and of a complex character. . . ." (*United States v. Kagema* (1886) 118 U.S. 375, 381 [30 L.Ed. 228, 230; 6 S.Ct. 1109].)

The recent Supreme Court trend, at least insofar as the applicability of state laws to Indians is concerned, has been away from the idea of inherent Indian sovereignty and toward reliance on federal pre-emption. (*Rice v. Rehner* (July 1, 1983) 51 U.S.L.Week 5141, 5142.) "The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power." (*McClanahan v. Arizona Tax Commission, supra,* 411 U.S. 169, 172.)

The question of whether federal law pre-empts the state's exercise of its regulatory authority is not awarded by a traditional pre-emption approach. (*Ramah Navajo Sch. Bd. v. Bureau of Revenue* (1982) 458 U.S. 832 [73 L.Ed.2d 1174, 1180; 102 S.Ct. 3394].) Indian sovereignty, as it has developed now manifests itself in this pre-emption analysis in such a way to "provide a backdrop against which the applicable treaties and federal statutes must be read." (*McClanahan, supra,* 411 U.S. at 172; *Rice, supra,* 51 U.S.L.Week at 5142.) The Supreme Court has articulated this unique pre-emption approach in a variety of ways. "Individualized treatment [is now given to] particular treaties and specific federal statutes, including statehood enabling legislation, as they, taken together, affect the

respetive rights of States, Indians and the Federal Government." (*Mescalero Apache Tribe v. Jones* (1973) 411 U.S. 145, 148 [36 L.Ed.2d 114, 119; 93 S.Ct. 1267].) State law may unlawfully "infringe on the right of reservation Indians to make their own laws and be ruled by them." (*Williams v. Lee* (1959) 358 U.S. 217, 220 [3 L.Ed.2d 251, 254; 79 S.Ct. 269].) "The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been pre-emptcd by operation of federal law." (*White Mountain Apache Tribe v. Bracker* (1980) 448 U.S. 136, 143 [65 L.Ed.2d 665, 672; 100 S.Ct. 2578].) Pre-emption "calls for a particularized inquiry into the nature of the state, federal and tribal interests at stake. . . . State jurisdiction is pre-empted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law unless the state interests at stake are sufficient to justify assertion of state authority." (*New Mexico v. Mescalero Apache Tribe* (June 13, 1983) 52 U.S.L.Week 4741, 4743-4744.) "The role of tribal sovereignty in pre-emption analysis varies in accordance with the particular 'notions of sovereignty that have developed from historical traditions of tribal independence.' [Citation.] These traditions themselves reflect the 'accommodation between the interests of the tribes and the federal government, on the one hand, and those of the state, on the other. [Citation.]" (*Rice, supra*, 51 U.S.L.Week at 5142.)

We read from these cases an ad hoc balancing approach[3]

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[3] We are mindful that in applying this balancing approach "[a]mbiguities in the federal law have been construed generously [in the Indian's favor] in order to comport with . . . traditional notions of [Indian] sovereignty and with the federal policy of encouraging tribal independence."(*White Mountain Apache Tribe v. Bracher, supra*, 448 U.S. 136, 143-144.)

concerning pre-emption of state laws as they affect Indians. "When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the state's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest." (*Bracker, supra,* 448 U.S. at 144.) Therefore, Indians retain powerful control and authority to regulate their internal and social relations on the reservation. Congress' goal of encouraging tribal self-sufficiency and economic development presents a nearly insurmountable barrier to the states should they attempt to regulate in these particular areas. (*Mescalara Apache Tribe, supra,* 51 U.S.L.Week at 4743-4744.) However, this is not the case with respect to the Outdoor Advertising Act.

In fact, the general context in which this case comes to us is quite different from nearly all the cases to which we are cited. Primarily in these cases no *particular* federal statute is in issue. Rather the issue is whether a particular state statute can be applied to the Indians in light of the strong federal interest of encouraging Indian self-sufficiency and Congress' control over the Indians. (U.S. Const., art. I, § 8, cl. 13.) For example, in *White Mountain Apache Tribe v. Bracker, supra,* 448 U.S. 136, the issue was the applicability of a state license and fuel use tax (not particularly authorized by Congress) to activities of non-Indians engaged in commerce on Indian lands. The court found the state laws pre-empted by applying the balancing approach as discussed above. *Ramah Navajo Sch. Bd. v. Bureau of Revenue, supra,* 458 U.S. 832, and *Santa Rosa Band of Indians v. Kings County* (9th Cir. 1975) 532 F.2d 655, *cert. den., Kings County v. Santa Rosa Band of Indians* (1977)

429 U.S. 1038 [50 L.Ed.2d 748, 97 S.Ct. 121] required the respective courts to determine if certain congressional procedures were so pervasive that they pre-empted the effect of particular state statutes on the Indians. Again, no federal statute was applicable.

Contrast *Leavenworth, etc. R.R. Co. v. United States* (1875) 92 U.S. 733 [23 L.Ed. 634], which presents a similar format to the case at bar. In *Leavenworth*, Congress passed a particular statute allowing the states to acquire certain lands to aid in the construction of railroads. The issue before the court was whether the state could properly acquire Indian reserved lands. The statute was in general terms which neither included nor excluded any particular lands. The court concluded that absent an express declaration, the Indian lands were excluded from this statute. (92 U.S. at 741, 744.) Further the Indian lands were expressly excluded from the act's reach: "That any lands heretofore reserved to the United States, by any Act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be, and the same are hereby reserved to the United States from the operation of this Act. . . ." (92 U.S. at 746.)

The instant case involves a federal statute (Highway Beautification Act) which authorizes the state to act. Unlike the *Leavenworth* statute, the Highway Beautification Act provides:

"All public lands or *reservations of the United States* which are adjacent to any portion of the Interstate system and the primary system shall be controlled in accordance with the provisions of this section and the national standards promulgated by the Secretary." (23 U.S.C., § 131, subd. (h); emphasis supplied.)

We are thus confronted with the issue of whether, in light of the balancing approach discussed above, section 131, subdivision (h), authorizes the state to reach Indian land. In effect, we are dealing with the flip side of pre-emption analysis.

Both sides present strong arguments on whether the Highway Beautification Act authorizes states to control Indian lands particularly in light of section 131, subdivision (h). Plaintiffs point out the House Report summarizing the legislative intent of the Highway Beautification Act supports their interpretation that the Outdoor Advertising Act reaches Indian land: "This section simply extends to all public lands and reservations of the United States which are adjacent to any portion of the Interstate System or the primary system the same control, covering other roads which are subject to this legislation." (2 U.S. Code Cong. & Admin. News (1965) 89th Cong., 1st Sess., p. 3717.)

Regarding this same section, plaintiffs assert the term "reservation" had to include Indian reservation because the House discussed *Indian* Reservations in their debates on this legislation: ". . . A great many tourists who travel through South Dakota like to stop and visit our Sioux Indian Reservations. . . . South Dakota has at least five great Indian Reservations. Some of the highways pass through some of the reservations. . . . Our fine Indian citizens encourage the people . . . to stop and get acquainted with Indian ways . . [¶] But there is no way in the world that tourists who desire to take advantage of such opportunities can do so unless it is by signs directing them off a highway to a reservation. . . ."(III Committee Hearing on Floor Debates, Cong. News, part 18, 89th Cong., 1st Sess., at p. 24123.)

Desert also points out the legislators were informed that this country contained some 41,000 miles of Interstate Highway. They also knew the Interstate paralleled Indian land; so by specifying "forty-one thousand miles" in the Act (see 23 U.S.C., § 131, subd. (e)(1)) they must necessarily have intended it to apply to the adjacent Indian land.

Further, plaintiffs cite us to *United States V. Portneuf-Marsh Valley R.R. Co.* (1913) 205 F. 416, where at page 419, the court states: "That an Indian reservation is a 'reservation of the United States' admits of little doubt."

Conversely, defendant and amicus curiae argue that the Federal Highway Administration's interpretation of the Highway Beautification Act should be given deference. It concluded the "failure of the Act to delegate either to the Federal Highway Administration, Department of Transportation, or to the Department of the Interior, the explicit authority to implement the act on Indian reservations results in nonapplicability to Indian reservations. . . ."

We are also urged to give deference to the Department of the Interior's interpretation that the Highway Beautification Act does not apply to Indian reservations. The Interior department stated that "absence of statutory language expessly including or excluding Indian reservations as territory subject to the [Highway Beautification Act] renders the term 'reservations' as used in section 131(h), ambiguous."[4] And "doubtful statutory language must be interpreted in favor of the Indians." (*Administrative Appeal of the Morongo Band of Mission Indians v. Area Director, supra,* 86 I.D. 680, 687-688.)

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[4] See also *United States v. Celestine* (1909) 215 U.S. 283, 285 [54 L.Ed. 195, 197] for a discussion of inherent problems of interpreting "reservation" always to include Indian country.

Having thus far set out the standards, the law, and the arguments, we must now apply the balancing approach to determine if the Outdoor Advertising Act has been pre-empted. As stated, this is not a traditional pre-emption analysis because (1) the Outdoor Advertising Act affects Indians and (2) there is a Congressional Act which purportedly authorized state regulation. There is no question that the Outdoor Advertising Act effects the Morongo Indian Tribe. Clearly any regulatory scheme limiting economic pursuits will have an effect. However, outdoor advertising can hardly be deemed a traditional Indian custom affecting tribal relations on the reservation.

More importantly, we find the Highway Beautification Act specifically contemplated and authorized states to regulate outdoor advertising on Indian lands adjacent to Interstate Highways. Congress no doubt intended its Highway Beautification Act policies to be applied over all interstate highways. A checkerboard effect would defeat this intent, and such effect is precisely what would result should we find the Outdoor Advertising Act inapplicable in this case. Regarding the displays in this case, we conclude the Outdoor Advertising Act does apply.

Having concluded the Highway Beautification Act authorizes state regulation, we need not and do not reach the issue of whether 28 United States Code section 1360 (Public Law 280) would independently authorize the application of the Outdoor Advertising Act.

VI

Defendant also mounts a procedural attack based on Code section 389,[5] joinder of indispensable party. The argument is made that the Band, as an Indian tribe enjoys immunity from suit.[6] Because the Band is an indispensable

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[5] Code of Civil Procedure section 389, subdivisions (a) and (b) provide:

"(a) A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party.

"(b) if a person as described in paragraph (1) or (2) of subdivision (a) cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed without prejudice, the absent person being thus regarded as indispensable. The factors to be considered by the court include: (1) to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; (2) the extent to which, by provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff or cross-complainant will have an adequate remedy if the action is dismissed for nonjoinder."

[6] Indian immunity from the governing arm of the state court is not a foregone conclusion in every case. As indicated in the recent *Southwest Forest Industries v. Hupa (Hoopa) Timber Corporation* (Jan. 26, 1984, 1 Civ. AO 15598; 84 D.A.R. 526) — Cal.App.3d —, local tribunals in each instance can and will determine if Congress has authorized state court action. In the present case, however, Indian

party concerning the two ations below, defendant asserts section 389 mandates dismissal.

The failure to join an indispensable party is not a jurisdictional defect mandating dismissal. "[T]he court still has power to render a decision as to the parties before it which will stand." (*Kraus v. Willow Park Public Golf Course* (1977) 73 Cal.App.3d 354, 364.) The court must determine whether in "equity and good conscience" the action will proceed. We believe it should and did proceed because there was no pre-emption in this case. "While under some circumstances a state may exercise concurrent jurisdiction over non-Indians acting on tribal reservations, [citations] such authority may be asserted only if not pre-empted by operation of federal law." (*Mescalero Apache Tribe, supra,* 51 U.S.L.Week at p. 4743.) In this instance, the state courts must necessarily have the power to enforce state laws. The Band may not hide behing this procedural camouflage in order to escape the Outdoor Advertising Act.

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immunity need not be addressed because the Morongo Indian Tribe is not a party.

VII

This judgment as to both actions is affirmed.
CERTIFIED FOR PUBLICATION

Rickles

J.

We concur:

Kaufman

Acting P. J.

McDaniel

J.

APPENDIX C

Order Due
July 31, 1985
SUPREME COURT
Filed
July 10, 1985
LAURENCE P. GILL, Clerk Deputy

ORDER DENYING REHEARING

I. A. No. 31911
IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

PEOPLE ex rel. DEPARTMENT OF TRANSPORTATION

v.

NAEGELE OUTDOOR ADVERTISING COMPANY OF CALIFORNIA, INC.

DESERT OUTDOOR ADVERTISING, INC.

v.

NAEGELE OUTDOOR ADVERTISING COMPANY OF CALIFORNIA, INC.

OPINION MODIFIED.

Respondent's petition for rehearing is denied.

Acting Chief Justice

COPY

SUPREME COURT
FILED
July 10, 1985
LAURENCE P. GILL, Clerk Deputy

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

THE PEOPLE ex rel. DEPARTMENT OF TRANSPORTATION,
Plaintiff and Respondent,
v.

NAEGELE OUTDOOR ADVERTISING COMPANY OF CALIFORNIA, INC.
Defendant and Appellant.

DESERT OUTDOOR ADVERTISING, INC.
Plaintiff and Respondent,
v.

NAEGELE OUTDOOR ADVERTISING COMPANY OF CALIFORNIA, INC.
Defendant and Appellant.

MODIFICATION OF OPINION

BY THE COURT:

The opinion herein, appearing at 38 Cal.3d 509, is modified as follows:

1. On page 513, delete the words "and Desert Outdoor Advertising, Inc. (Desert)" after the words "[i]n 1977 the Band solicited proposals for further leases from several . . . firms including Naegele. . . "

2. On page 517, the cite to *Portneuf-Marsh* should begin: "see . . ." so that the sentence will now read: "The board's interpretation of the Highway Beautification Act is debatable (see United States v. Portneuf-Marsh Valley Irr. Co. (E.D. Idaho 1913) 205 Fed. 416 419, affd. (9th Cir. 1914) 213 F. 601,603), but we need not resolve that debate here."

3. On page 522, add the following: "See also People v. McCovey (1984) 36 Cal.3d 517, 525" to be inserted after the following language so that it now reads: "Nonetheless, amid the welter of decisions analyzing preemption in this unique context, the Supreme Court has recently reaffirmed that 'a State will certainly be without jurisdiction if its authority is preempted under familar principles of preemption. . . .' (*New Mexico, supra,* 462 U.S. at pp. 333-334. See also People v. McCovey (1984) 36 Cal.3d 517, 525.)"

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 3550 Wilshire Boulevard, Suite 916, Los Angeles, California. On this date, October 7, 1985, I served the within PETITION FOR WRIT OF CERTIORARI in re: "Desert Outdoor Advertising, Inc. vs. Naegele Outdoor Advertising, Co. of California, Inc." in the Supreme Court of the United States, October Term, 1985, No.....

on the persons interested in said action by placing 3 true copies thereof enclosed in sealed envelopes with first class postage prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

BARTON C. GAUT
RONALD J. KOHUT
RICHARD CROSS
BEST, BEST & KREIGER
4200 Orange Street
Riverside, CA 92502

All parties required to be served have been served.

I certify (or declare) under penalty of perjury that the foregoing is true and correct.
Executed on October 7, 1985
at Los Angeles, California.

Kathleen Kaltenbach

Supreme Court, U.S.
FILED
NOV 9 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-639

In The

Supreme Court of the United States

October Term, 1985

DESERT OUTDOOR ADVERTISING, INC.,

Petitioner,

vs.

NAEGELE OUTDOOR ADVERTISING CO. OF CALIFORNIA, INC.,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of California

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The Morongo Band of Mission Indians is a sovereign, federally recognized Indian tribe and beneficial owner of the Morongo Reservation. *See Morongo Band of Mission Indians v. Area Director, Sacramento Office*, 7 Interior Board of Indian Appeals 299, 86 Int. Dec. 680, 681-82 (1979) (Morongo) (Appendix 1 hereto). The reservation was created between 1876 and 1948 by a series of seven executive orders, one presidential proclamation, one federal statute and one deed. Pursuant to the Mission Indian Relief Act of 1891, 26 Stat. 712, the federal government holds it in trust "for the sole use and benefit of the band or village . . .," to be conveyed at the termination of the trust "free of all charge or incumbrance whatsoever. . . ."

The reservation lies astride a pass between the San Bernardino and San Jacinto Mountain Ranges. Its few natural resources yield little income. Its economy is depressed and many of its members are unemployed and live in poverty. Less than one square mile of its 32,254 acres is suitable for economic development. *Morongo, supra*, 86 Int. Dec. at 681. This small area is a strip of land that flanks Interstate Highway 10, which passes across the southern part of the Morongo Reservation and is the major east-west artery for travel to and from metropolitan Southern California. *Id.*

The Band has long derived a major part of its income from outdoor advertising. In 1963 the Band's general membership delegated to the Morongo Tribal Council authority to negotiate outdoor advertising agreements. In a 1977 appraisal report the Southern California Ap-

praisal Office of the Bureau of Indian Affairs (BIA) identified outdoor advertising as "the highest and best use of [the] reservation land along Interstate 10." *Morongo, supra,* 86 Int. Dec. at 681 n. 3.

In 1977 the Band solicited proposals for further outdoor advertising from several outdoor advertising businesses. *See People ex rel. Dept. of Transportation v. Naegele Outdoor Advertising Co.,* 38 Cal. 3d 509, 513 (1985) (Naegele). On the basis of the more favorable terms offered by the Naegele Outdoor Advertising Company of California, Inc., the Band negotiated a lease with Naegele. Since 25 U.S.C. § 415 and former 25 C.F.R. § 131 (now codified as 25 C.F.R. § 162) required the approval of the Department of Interior for such leases, the Band and Naegele submitted the lease to the local Bureau of Indian Affairs (BIA) office for approval. That office disapproved the lease on the ground that it violated the Federal Highway Beautification Act of 1965 (Pub. L. 89-285, codified as amended at 23 U.S.C. §§ 131, 136 & 319) and the California Outdoor Advertising Act (1970 Cal. Stats., ch. 991 § 2 at 1764, codified as amended at Cal. Bus & Prof. Code §§ 5200 *et seq.*). On March 14, 1978, the Area Director of the BIA upheld the disapproval. The Band appealed to the Commissioner of Indian Affairs, who did not act on the appeal within the 30 days required by 25 C.F.R. § 2.19(a), and the appeal was automatically referred to the Interior Board of Indian Appeals. *See* 25 C.F.R. § 2.19(b).

On December 13, 1979, the Interior Board of Indian Appeals reversed the decision of the Area Director and remanded the case to the Acting Deputy Commissioner of Indian Affairs, with instructions that the BIA "seek to

effectuate a business lease for outdoor advertising between the Morongo Band and the Naegele Company consistent with this opinion." *Morongo*, *supra*, 86 Int. Dec. at 692. The Board's action was that of the highest authority within the Department of the Interior and was final for the Department. *Id.*; *see* 43 C.F.R. § 4.1.

Meanwhile, in March of 1978 the Band had enacted a land use ordinance designating the Reservation land along Interstate 10 as suitable for commercial development, and on March 30, 1978, while the Band's appeal of the Area Director's decision was still pending, the Band and Naegele entered into a written agency agreement. Pursuant to the agreement, Naegele installed and began operating 15 outdoor advertising signs on the Morongo Reservation.

Naegele paid the band $250,000 for the right to operate the signs for 10 years. The Band has used this money for fire protection, improved television reception, development of new tribal enterprises, operation of the Tribal Business Committee, and development of alternative energy sources.

On December 12, 1980, Desert Outdoor Advertising, Inc. ("Deser.") filed a first amended complaint against Naegele, alleging causes of action for nuisance, unfair competition, and intentional and negligent interference with prospective economic advantage. The Band was not named as a defendant. Naegele's demurrer was sustained as to the first and overruled as to the remaining causes of action.

Desert moved for summary judgment on the ground that the failure of the Morongo signs to comply with the

requirements of the California Outdoor Advertising Act constituted unfair competition. On September 11, 1981, the Riverside Superior Court entered summary judgment in favor of Desert on its second cause of action for unfair competition. On April 21, 1982, the Superior Court entered an amended judgment nunc pro tunc and decreed inter alia (1) that Naegele could not erect outdoor advertising signs on the Morongo Reservation unless it obtained outdoor advertising permits from the State Department of Transportation; and (2) that Naegele dismantle all of the structures that it had erected on the reservation at the Band's request. The Court stayed enforcement of its judgment pending resolution of the case on appeal.

The Fourth District Court of Appeal, Division Two, consolidated Desert's action with the parallel action by the State of California Department of Transportation (the "Department").[1] Because resolution of the issues being appealed would significantly affect the Morongo Band, the court granted the Band's application for leave to file a brief *amicus curiae.*

On February 3, 1984, after all briefs had been filed and oral argument heard, Naegele filed a motion for judicial notice, by which it apprised the appellate court that on February 2, 1984, the Acting Superintendent of the Southern California Agency of the BIA had approved the Morongo-Naegele agreement, retroactive to the date of its execution on March 30, 1978. Appendices 2 & 3 hereto. Un-

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[1] *People of the State of California, etc., Respondent, v. Naegele Outdoor Advertising Company of California, etc., et al., Appellant,* No. 4 Civ. 27494.

deterred, the appellate court affirmed the trial court's granting of summary judgment in both actions.

Naegele filed its petition for hearing with the California Supreme Court on April 9, 1984. The State and Desert filed answering briefs, and the Supreme Court again allowed the Morongo Band to file an *amicus curiae* brief.

On May 2, 1985, the California Supreme Court issued its opinion in the consolidated State and Desert actions. It held (1) that whether or not Congress intended the outdoor advertising standards of the Highway Beautification Act to apply on Indian reservations, it did not intend that these standards be enforced through the assertion of state power; (2) that the Act of August 15, 1953 (Public Law No. 83-280, 67 Stat. 589 (codified at 28 U.S.C. § 1360) (Public Law 280)) did not constitute a grant by Congress to the states of authority to regulate outdoor advertising on Indian reservations; and (3) that California's Outdoor Advertising Act was further preempted because Congress had, by the HBA, reserved to federal authorities responsibility for enforcing the Act on federal lands and reservations, or, alternatively, because the assertion by California of its outdoor advertising laws would impose inconsistent state regulations in an area reserved for federal oversight. *Naegele, supra*, 38 Cal. 3d at 514-23.[2]

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[2] On August 3, 1984, the Ninth Circuit Court of Appeals issued its opinion in *United States ex rel. Buxbom v. Naegele Outdoor Advertising Company of California, Inc.*, 739 F.2d 473 (9th Cir. 1984), *cert. denied*, 83 L.Ed.2d 779, 105 S.Ct. 785, 53 U.S.L.W. 3484 (1985), reversing the decision below and re-

(Continued on following page)

Because it had based its ruling on grounds of federal preemption, the Court expressly refrained from deciding the additional defense asserted by Naegele, to wit, that the lawsuits asserted against Naegele should be dismissed pursuant to California Code of Civil Procedure Section 389 because the Morongo Band was a necessary party that could not be joined. *Id.* at 523 n. 12.

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ARGUMENT

1. Summary Of Opposition

Desert's petition for writ of certiorari is based on four contentions, the first three of which are links in a chain and the last of which is a catch-all.

First, Desert contends that the HBA applies to all lands adjacent to the federal highway system. The California Supreme Court expressly refrained from deciding this question, preferring instead to base its decision on the less intrusive ground that whether or not the HBA applies to Indian reservations, it does not delegate authority to enforce its standards in Indian country. Desert has had

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manding with directions to dismiss the relator's action. In *Buxbom*, Seymour Buxbom, the president of Desert Outdoor, had alleged (by a complaint filed on December 3, 1982 in the Central District of California) that the March 30, 1978 Morongo-Naegele agency agreement violated 25 U.S.C. § 81. In reversing the district court's grant of summary judgment in favor of Buxbom, the Ninth Circuit held that the BIA had the power to approve the agency agreement retroactively and further held that such approval precluded any judgment that the agreement between the Band and Naegele was void.

to resurrect this issue, however, in order to argue, as it does, that the HBA did delegate the states authority to enforce its "standards" on Indian reservations.

Desert's second contention is that the HBA bifurcated responsibility for implementing its "standards" on all federal lands, including Indian reservations. In support of this contention, Desert has concocted the unlikely hypothesis that although the HBA authorized federal agencies to promulgate rules implementing the HBA, it left to the states the business of enforcing these rules. The fact that this epochal interpretation of the HBA has never occurred to any of the affected federal agencies seems not to concern Desert.

This second contention in turn accounts for the third, which is that the California Supreme Court improperly, and unnecessarily, determined that the HBA preempted whatever authority California otherwise enjoyed to regulate on-reservation outdoor advertising. Finally, Desert argues somewhat mysteriously that there is no rational relationship between the HBA and tribal sovereignty, and that whatever else Congress might have intended in enacting the HBA it could not have meant to leave Indian reservations unregulated.

Naegele respectfully submits that this Court should refuse certiorari if only because Desert's line of argument, if adopted, would require the Court to decide two complex questions, both of which the California Court's decision wisely avoids, i.e., (1) whether the HBA applies to Indian reservations and (2) what on-reservation enforcement methods the State could resort to and the extent to which such enforcement activities should be allowed to interfere

with the Interior Department's management and oversight of the leasing of Indian trust lands.

In any case, Naegele respectfully submits, none of Desert's four contentions is well taken.

Finally, the fact remains that the Morongo Band is and has always been an indispensable party to this action. This case should be dismissed for failure to join an indispensable party who cannot be joined.

2. The HBA Does Not Apply To Indian Reservations

Desert bases its contention that the HBA was intended to apply to Indian reservations on four grounds.

It first observes that Section 131(h) of the HBA provides that all "public lands or reservations" are to be "controlled in accordance with the provisions of this section and the national standards promulgated by the Secretary." However, the mere mention of "public lands or reservations" cannot by itself be a basis for inferring that Congress intended the HBA's "standards" to apply to Indian country. The unqualified phrase "public lands" refers to the undifferentiated group of federal lands that have not already been devoted to a specific public purpose (such as being used for an Indian reservation). *Missouri, Kansas & Texas Railway Co. v. Roberts*, 152 U.S. 114, 119, 38 L.Ed. 377, 14 S.Ct. 496 (1894); *Newhall v. Sanger*, 92 U.S. 761, 23 L.Ed. 769 (1876). Indian reservations are *not* "public lands." *Minnesota v. Hitchcock*, 185 U.S. 373, 395-402, 22 S.Ct. 650, 46 L.Ed. 954 (1902); *Leavenworth, L. & G.R.R. v. United States*, 92 U.S. 733, 746-47, 23 L.Ed. 634 (1875); *United States v. Schwartz*, 460 F.2d 1365, 1372 (7th Cir. 1972). Rather, they are owned beneficially by the Indians, and legal title is held in trust by the United States

Government. The Government's trust responsibility forbids that Indian reservations be treated as if they were no different than public lands. The courts therefore will not construe a federal statute applicable on its face to "public lands" as applicable to Indian reservations. *Lane v. Pueblo of Santa Rosa,* 249 U.S. 110, 113, 63 L.Ed. 504, 39 S.Ct. 185 (1919). Thus, merely by use of the term "public lands," Congress could not have intended to make Indian reservations subject to the HBA.

Nor can the unqualified term "reservations" by itself be construed as referring to Indian reservations. The term "reservations" has been used broadly "to describe a body of land, large or small, which Congress has reserved from sale for any purpose." *United States v. Celestine,* 215 U.S. 278, 54 L.Ed. 195, 30 S.Ct. 93 (1909). It may include military reservations, national forests or parks, or any other federally protected reserve. Indian reservations, on the other hand, are unique, since vital rights are vested in the resident Indians and tribes. *Morongo, supra,* 86, I.D. at 687; *see* R. Strickland, et al., eds. *Felix S. Cohen's Handbook of Federal Indian Law 1982 Edition,* 220-28 (1982) (Cohen's Handbook).

Desert next argues that because a pair of United States senators grandiloquently traded assurances that "the *precise* mileage of highways . . ." to be covered by the HBA was 41,000 miles, and that "the whole of that mileage [was] proposed to be covered . . .," this Court may take it as established that Congress intended Indian reservations to be subject to the HBA's standards. *See* 3 Committee Hearing on Floor Debates, Cong. News, part 18, 89th Cong., 1st Sess., at 23874 (emphasis added). It is re-

spectfully submitted, however, that a mere numerical reference (which had obviously been rounded off to the nearest 1,000 miles), accompanied by the rhetorical flourish that this encompassed "all" of the federal highway system, is an extremely insubstantial basis on which to conclude that the HBA was intended to apply to all highways, *even* those located on Indian reservations. Here, Desert is arguing that a federal act transferred regulatory authority over Indians to the states. It is fundamental that any federal statute which would make such a jurisdictional transfer must do so in express, unambiguous language. *Bryan v. Itasca County,* 426 U.S. at 373, 392, 48 L.Ed.2d 710, 96 S.Ct. 2101 (1976).

Desert also refers to a statement of the Honorable Wayne M. Aspinall, in which the congressman noted:

> "*If* . . . [the HBA] is intended to cover, for example, Indian reservations, it should be kept in mind that such reservations are not owned by the United States . . . ." Petition at 8 (emphasis added).

Desert observes that the congressman's suggestion of an alternative phraseology, which would have expressly excluded Indian reservations, was not adopted — and from this fact concludes that Congress intended the HBA to apply to Indian lands. Obviously, however, the mere fact that Congress failed to adopt language which would have made it clear that the HBA does *not* apply to Indian reservations does not warrant the conclusion that Congress therefore intended the Act to apply to Indian reservations. At best, the legislative record, like the statute it underlies, remains ambiguous. And it is fundamental that ambiguous language

in federal statutes should be construed *in favor* of Indians, especially where it is claimed, as here, that the ambiguous statute abolishes by implication important tribal rights. *Bryan v. Itasca County, supra,* 426 U.S. at 392; *Santa Rosa Band of Indians v. Kings County,* 532 F.2d 655, 660-61 (9th Cir. 1975), *cert. denied,* 429 U.S. 1038, 50 L.Ed. 2d 748, 97 S.Ct. 731 (1977).

Finally, in support of its argument that the HBA was intended to apply to Indian reservations, Desert makes reference to an associate solicitor's April 17, 1967 opinion, which concluded that the HBA was intended to apply to Indian reservations. However, as has already been pointed out, the Interior Department has since rejected that conclusion — in a final administrative decision dealing with the very signs which are the subject of this action. *Morongo, supra.* In fact, both the Department of the Interior *and* the Department of Transportation, the two federal agencies charged with responsibility for implementing the HBA on federal lands, have concluded that the HBA was *not* intended to apply to Indian reservations. *Id.,* 86 I.D. at 685-89; Fed. Hy. Ad. Memo. Jan. 21, 1976 (Appendix 4 hereto). In so concluding, both agencies placed special emphasis on the fact that the Highway Beautification Act relies on state action to enforce its standards. *Morongo, supra,* 86 I.D. at 686; Fed. Hy. Adm. Memo., *supra,* at 8 ff.; *see* 23 U.S.C. § 131(b)-(k); 23 C.F.R. §§ 750.301-308, 750.110 & 750.115. This Court should not substitute its judgment for that of these agencies if their conclusion is the result of a reasonable construction of the statute in question. *State of Wash., Dept. of Ecology v. U.S.E.P.A.,* 752 F.2d 1465, 1469 (9th Cir. 1985) (Wash. v. U.S.E.P.A.).

For all of these reasons, it is respectfully submitted that Desert's first contention, i.e., that Congress intended the HBA to apply to Indian reservations, is without merit.

3. The HBA Did Not Delegate To The States Authority To Enforce The HBA On Indian Reservations

Desert's second contention is that the HBA bifurcated responsibility for implementing its "standards" on federal lands, including Indian reservations, and specificially that it gave the states authority to enforce the HBA's standards on Indian reservations. This contention is without support for a variety of reasons.

First, the Act does not delegate any regulatory authority, whether rule-making or enforcement, over federal lands. *See* 23 U.S.C. § 131; *National Advertising Co. v. City of Ashland, Or.*, 678 F.2d 106, 108 (9th Cir. 1982); *State of South Dakota v. Adams*, 506 F.Supp. 50, 58-59 (C.D.S.D. 1980), *aff'd sub nom., South Dakota v. Goldschmidt*, 835 F.2d 698 (8th Cir. 1980), *cert. denied sub nom., South Dakota v. Lewis*, 451 U.S. 984, 68 L.Ed.2d 841, 101 S.Ct. 2316 (1981). Rather, the purpose of the statute is to induce the states to regulate outdoor advertising in a manner consistent with certain federal standards. *Markham Advertising Company v. State*, 73 Wash. 2d 405, 439 P.2d 248, 257 (1968), *appeal dismissed*, 393 U.S. 316, 89 S.Ct. 553, 21 L.Ed.2d 512, *reh'g denied*, 393 U.S. 1112, 89 S.Ct. 854, 21 L.Ed.2d 813 (1969) ("the purpose of the federal statute is obviously to induce the states to act, not to require them to do so"); *National Advertising Co. v. City of Ashland, Or., supra*, 678 F.2d at 108-9. The Act achieves

this goal by allowing the states to choose between compliance or foregoing ten per cent of their allotment of federal aid highway funds. 23 U.S.C. § 131(j) and (l); *see State of Vermont v. Brinegar,* 379 F.Supp. 606, 609 (D.Vt. 1974). Neither subsection (h) of Section 131, nor any other part of the HBA, constitutes a grant of jurisdiction to the states. To the contrary, the Act assumes that the states already have the authority needed to regulate outdoor advertising in the manner recommended. *State of South Dakota v. Adams, supra,* 506 F.Supp. at 59.

Desert's unlikely hypothesis that the HBA gave states enforcement jurisdiction over Indian reservations is also contradicted by the Ninth Circuit's holding in *Ryan Outdoor Advertising, Inc. v. United States,* 559 F.2d 554, 556-57 (9th Cir. 1977) (per curiam). There the appellate court held that the source of the Interior Secretary's independent authority to deviate from HBA standards was the general congressional grant of authority to the Interior Secretary to administer laws dealing with public lands. *Id.* at 556. The Secretary is the federal official charged with ultimate responsibility for administering Indian affairs; *a fortiori,* he has authority to deviate from the HBA where Indian lands are concerned; and if *he* has such authority, then the states do not.

Desert's theory of bifurcated jurisdiction is also contrary to the established rule of statutory interpretation that state laws will not be held applicable to on-reservation activities except where Congress has *expressly* provided that state laws shall apply. *Bryan v. Itasca County, supra,* 426 U.S. at 376 n. 2; *DeCoteau v. District County Court,* 420

U.S. 425, 427-28 n. 2, 43 L.Ed.2d 300, 95 S.Ct. 1082 (1970); *see Wash. v. U.S.E.P.A., supra,* 752 F.2d at 1469-70. Where as here a general federal law would, if applied to Indians or their reservations, infringe upon a particular Indian right or policy, that law will be held not to apply to Indians on reservations unless Congress has expressly provided to the contrary. *Bryan v. Itasca County, supra,* 426 U.S. at 392; *Morton v. Mancari,* 417 U.S. 535, 41 L.Ed.2d 290, 94 S.Ct. 2474 (1974); *Squire v. Capoeman,* 351 U.S. 1, 100 L.Ed. 883, 76 S.Ct. 611 (1956); 1 *Opinions of the Solicitor of the Interior Relating to Indian Affairs 1917-1974,* 1335 (May 31, 1945) (despite its declared applicability to "public and reserved lands of the United States . . ., the Boulder Canyon Project Act did *not* apply to the Morongo Indian reservation); *see United States v. Blue,* 722 F.2d 383, 385 (8th Cir. 1983); Cohen's Handbook, *supra,* at 285.

Desert's theory is also contrary to the established rule that federal legislation is not to be construed in a manner that would limit or extinguish any of the traditional prerogatives of tribal sovereignty, absent a clear expression of intent by Congress. *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 149-150, 71 L.Ed.2d 21, 102 S.Ct. 894 (1982). This Court may presume that Congress intended to exercise its power in a manner consistent with the federal trust obligation. *Wash. v. U.S.E.P.A., supra,* 752 F.2d at 1470.

In support of its argument that the HBA delegated enforcement authority to the states, Desert makes much of the fact that the HBA of 1965 did not repeat word-for-word certain language in the Federal Aid Highway Act of 1958, which had directed the Secretary of Commerce to

make whatever agreements were necessary with the federal agencies having jurisdiction over public lands or reservations, to ensure that that 1958 Act's purpose was realized. From the failure of the 1965 HBA to reiterate this language, Desert would have this Court believe that Congress had "changed its *entire philosophy* . . ." and "[drawn] *the distinction between* the applicable *standards* governing billboard advertisement on Interstate and primary highways on the one hand *and enforcement* of those standards on the other hand." Petition at 10-11 (emphasis added). This argument assumes as its premise that Congress had an almost neolithic grasp of our mother tongue, i.e., that Congress was incapable of saying plainly what Desert was quite able to say in the above-quoted passage. It also announces as a *fait accompli* a shocking and unprecedented shift in the balance of power between state and federal governments. Henceforth, according to Desert, the states shall have unfettered authority to enter all federal reservations, military and Indian alike, in pursuit of deviant billboards.

Naegele respectfully submits that Desert's argument that the HBA impliedly granted the states enforcement jurisdiction over all on-reservation outdoor advertising activities is without merit.

4. The California Supreme Court's Preemption Holding Was Correct

The State Supreme Court held that California's claimed authority to regulate on-reservation outdoor advertising was preempted on two grounds, both of which fell under the rubric of those "familiar principles of pre-emption" referred to by this Court in its opinion in *New Mexico v. Mescalero Apache Tribe, supra,* 462 U.S. at 333-34. The

State Court first held that the HBA clearly manifested Congress's intent to design a comprehensive scheme for regulation of outdoor advertising, and then found that the Act expressly "reserved to federal authorities the responsibility for enforcing the [A]cts provisions upon federal lands and reservations." It is this conclusion that Desert has attempted to discredit by its far-fetched theory of bifurcated jurisdiction. For the reasons already set forth above, that contention is unsupportable.

However, even assuming for the sake of argument that Desert's theory of bifurcated jurisdiction is correct, the California Supreme Court adduced an *additional* reason why state jurisdiction over on-reservation outdoor advertising would in any case be preempted, namely, the fact that Congress and the executive branch have by numerous enactments and regulations indicated unambiguously that regulation of tribal enterprises like this one is within the exclusive jurisdiction of the Interior Department. *Naegele, supra*, 38 Cal.3d at 522 & n.9. In support of this conclusion, the Court referred briefly to the fact that "Interior's authority to supervise the enterprise at issue here cannot be doubted," citing 25 U.S.C. § 415(a) and 25 C.F.R. § 162. To this list, the Court could have added, had it wanted to, the actual approval by the Secretary of the Interior of the Morongo-Naegele lease agreement (Appendices 2 & 3 hereto), 25 U.S.C. § 81 (which governs all contracts between Indians and non-Indians), the decision of the Interior Department in *Morongo*, and the numerous congressional and executive pronouncements establishing the firm federal policy of encouraging tribal sovereignty and economic self-development.

Desert has not even addressed, much less attempted to discredit, this additional ground for holding that state authority to regulate on-reservation outdoor advertising is preempted by federal law.

5. Desert's Subsection D Fails To State Any Reason Why Certiorari Should Be Granted

An examination of the argument contained within subsection D of the Petition reveals that it in fact consists of several unrelated arguments.

First, Desert has posed for itself and the Court the nonsensical question whether a rational relationship exists between the HBA and the right of reservation Indians to make their own laws. As has already been explained, whether a federal statute of general application is also applicable to the on-reservation activities of Indians has nothing to do with whether there was a rational basis for the enactment of the statute. In fact, the test is considerably more stringent. *Cf. Wash. v. U.S.E.P.A., supra*, 752 F.2d at 1469-72.

Second, Desert suggests that this case poses a unique question not previously addressed by this Court, namely, whether and under what circumstances federal legislation designed to encourage state adoption of certain national standards will be deemed a cession of regulatory and enforcement jurisdiction by the federal government to the states, and in particular, whether and under what circumstances such legislation will be deemed to include a grant of state jurisdiction over Indian country. *See* Petition at 18-19. In fact, this and other courts have addressed both questions on several occasions.

The general rule is that federal legislation designed to encourage adoption of certain national standards does *not* constitute a cession of regulatory and enforcement jurisdiction by the federal government to the states, unless Congress has indicated, by "clear and unambiguous" language, that it intends this result. *See Hancock v. Train,* 426 U.S. 167, 179, 48 L.Ed.2d 555, 96 S.Ct. 2006 (1976) (interpreting § 118 of the Clean Air Act, 42 U.S.C. § 1857-(f)); *E.P.A. v. State Water Resources Control Board,* 426 U.S. 200, 220-21, 48 L.Ed.2d 578, 96 S.Ct. 2022 (1976) (interepreting § 313 of the Federal Water Pollution Control Act Amendments of 1972. 33 U.S.C. §1323). It is clear from the face of the HBA that it contains no "clear and unambiguous" grant of regulatory authority to the states.

As the California Supreme Court pointed out in *Naegele,* the Ninth Circuit Court of Appeals recently had occasion to address this question in the context of a claimed delegation of state enforcement jurisdiction over Indian lands. *Naegele, supra,* 38 Cal. 3d at 519 n. 5. In *Wash. v. U.S.E.P.A., supra,* 752 F.2d 1465, the Ninth Circuit upheld the EPA's conclusion that the federal Resource Conservation and Recovery Act (RCRA) "does not give the state jurisdiction over Indian lands, and that states could possess such jurisdiction only through an express act of Congress or by treaty," even though Indian tribes are clearly regulated entities under RCRA and the Act authorizes state regulation in lieu of the federal program. *Naegele, supra,* 38 Cal.3d at 519 n. 5. This by itself is sufficient to dispense with Desert's second argument under subsection D of its Petition.

Desert's third argument under subsection D is, apparently, that the only conduct to be regulated here is the on-reservation conduct of non-Indians. This statement is simply incorrect. The preceding statement of facts makes it abundantly clear that the signs at issue are owned by the Morongo Band and located on the reservation. The on-reservation conduct of Indians is therefore in issue.

Desert's fourth argument in subsection D of its Petition is, in effect, that in light of the HBA's salutary purpose, it is difficult to imagine that Congress intended to leave Indian reservations in their "distressed condition," that is, without the benefit of regulation by the State of California. Petition at 20. The simplest and most direct answer to this argument is that it is irrelevant (because the language of the HBA does not expressly and unambiguously confer regulatory jurisdiction on the State of California), although one might equally well respond that Congress clearly has left to the Interior Department responsibility for implementing the HBA's standards on Indian reservations.

Desert next argues that the off-reservation "spillover" effect of billboards is "total." However, as is pointed out above, the stretch of Interstate 10 involved in this case is located entirely on the Morongo Reservation. Desert's citation of *Rice v. Rehner*, 463 U.S. 713, 103 S.Ct. 3291, 77 L.Ed.2d 961 (1983) is inapposite because, as the California Supreme Court noted, *Rice* involved a situation where the federal statute in question expressly provided for the application of state law. *Naegele, supra*, 38 Cal. 3d at 521.

Finally, Desert argues that there is no tradition of tribal immunity that would be threatened by allowing state jurisdiction over on-reservation outdoor advertising. Basically, this is a misplaced preemption-balancing argument. It is wrong for two reasons. First, as the preceding discussion shows, the right of Indian tribes to control reservation land use is a fundamental and vital attribute of tribal sovereignty. Further, as the Ninth Circuit recently noted, there is also a strong "federal commitment to tribal self-regulation in environmental matters." *Wash. v. U.S.E.P.A.*, *supra*, 752 F.2d at 1471. Second, the fact that outdoor advertising is not an ancient custom simply is not and cannot be a basis for concluding that the Band does not have a protectible sovereign interest in engaging in this enterprise. Desert's argument utterly fails to take account of the direction of all federal Indian policy since the Indian Reorganization Act of 1934 — which has been to encourage development of reservation-based business enterprises. If Desert's argument holds water, then by the same token the Jicarilla and Crow tribes have no protectible sovereign interest in mining coal, since, obviously, there has never been a tribal tradition of coal mining. *See Merrion v. Jicarilla Apache Tribe*, *supra*, 455 U.S. at 138-152; *Crow Tribe of Indians v. State of Montana*, 650 F.2d 1104, 1115-17 (9th Cir. 1981), *modified*, 665 F.2d 1390, *cert. denied*, 459 U.S. 916, 103 S.Ct. 230, 74 L.Ed.2d 182 (1982).

6. The Morongo Band Of Indians Is An Indispensable Party That Cannot Be Joined, And Therefore This Action Should Be Dismissed

As already indicated, the California Supreme Court refrained from ruling on Naegele's claim that the Morongo

Band is an indispensable party that cannot be joined. Naegele again respectfully submits, however, that this action should now be dismissed for this reason.

California's Code of Civil Procedure Section 389 deals with joinder of parties and indispensable parties. In 1971 it was revised to conform substantially to Rule 19 of the Federal Rules of Civil Procedure. Code Civ. Proc. § 389, Law Revision Commission Comment, 1971 amendment. Like Rule 19, Section 389 sets forth a two-step procedure for determining (1) whether a party or entity not named as a defendant is a "necessary party," that is, one which should be "joined if feasible," and (2) if so, whether the action should be dismissed because the person not joined is an "indispensable party." C.C.P. § 389(a) & (b); *Vanoni v. County of Sonoma*, 40 Cal. App. 3d 743, 746-47, 115 Cal. Rptr. 485 (Ct. App. 1974); *cf. Bakia v. County of Los Angeles of State of Cal.*, 687 F.2d 299, 301 (9th Cir. 1982) (per curiam). Obviously, Desert is requesting relief which, if granted, would entail serious adverse consequences to the Band, to wit, (1) the invalidation of the Morongo-Naegele lease agreement insofar as it purports to authorize signs that violate the California Outdoor Advertising Act, and (2) displacement of tribal regulatory jurisdiction.

Federal decisions construing Rule 19 of the Federal Rules of Civil Procedure have found the mere possibility of such adverse consequences sufficient to make an Indian tribe a "necessary party" within the meaning of Rule 19(a). In the following cases, the courts held that an unjoined Indian tribe was a *necessary* party because the action would have had the effect of invalidating a lease or

other agreement to which the tribe was a party. *Manygoats v. Kleppe*, 558 F.2d 556, 558 (10th Cir. 1977); *Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1326 (9th Cir. 1975), *cert. denied sub nom, Susenkewa v. Kleppe*, 425 U.S. 903, 47 L.Ed.2d 752, 96 S.Ct. 1492 (1976); *Tewa Tesuque v. Morton*, 498 F.2d 240, 242 (10th Cir. 1974), *cert. denied*, 420 U.S. 962, 43 L.Ed.2d 440, 95 S.Ct. 1353 (1975); *National Indian Youth Council v. Andrus*, 501 F.Supp. 649, 681-82 (D.N.M. 1980), *aff'd sub nom, National Indian Youth Council v. Watt*, 644 F.2d 220 (10th Cir. 1981); *Yazzie v. Morton*, 59 F.R.D. 377, 383 (D.Ariz. 1973). An Indian tribe is also a necessary party to any action which would limit the scope of its sovereign rights (*Northern Cheyenne, etc. v. Adsit*, 668 F.2d 1080, 1089-90 (9th Cir. 1982), *rev'd on other grounds, Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 77 L.Ed.2d 837, 103 S.Ct. 3201 (1983)), including the tribe's right to control its own reservation lands (*Yazzie v. Morton, supra*, 59 F.R.D. at 383).

Because the language and intent of Rule 19 and Section 389 are virtually the same, federal decisions construing the proper application of Rule 19 may appropriately be consulted in determining the proper application of Section 389. *Conrad v. Unempoyment Ins. Appeals Bd.*, 47 Cal. App. 3d 237, 241, 120 Cal. Rptr. 803 (Ct. App. 1975). The Band must therefore be regarded as a person who, pursuant to Section 389(a), "shall be joined as a party . . . ."

The Morongo Band cannot be joined, however. It is a fundamental tenet of American Indian Law that Indian tribes enjoy sovereign immunity from suit. They cannot be sued in either federal or state court unless Congress or

the tribe consents to such suit. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 56 L.Ed.2d 106, 98 S.Ct. 1670 (1978).

The question remaining, therefore, is whether this action should have been allowed to proceed, in spite of the fact that the Band could not be joined. Like Subsection (b) of Rule 19, Section 389(b) sets forth four criteria to be considered in determining whether "in equity and good conscience the action should proceed among the parties before it, or should be dismissed without prejudice, the absent person being thus regarded as indispensable." *Cf. Bakia v. County of Los Angeles of State of Cal., supra*, 687 F.2d at 301. The four considerations are:

(1) The extent to which a judgment rendered without the absentee would prejudice it or the existing party;

(2) The extent to which prejudice can be alleviated or avoided by other measures;

(3) The adequacy of a judgment rendered without the absentee; and

(4) The adequacy of plaintiff's remedies if an action is dismissed for nonjoinder. Cal. Code Civ. Proc. § 389(b).

Here, the trial and appellate courts allowed a significant infringement of the Morongo Band's inherent sovereign rights, even though the Band was not a party to the action and could not be joined. This was error. Where, as here, the validity of an important tribal agreement with a non-Indian has been attacked, the courts have not hesitated to hold that the tribe was indispensable and, therefore, that the action had to be dismissed. Each of *Lomayaktewa, Tewa Tesuque, National Indian Youth Council* and

Yazzie, was an action to invalidate a lease between a tribe and a non-Indian, and in each the court held that the tribe was an indispensable party because, among other things, cancellation of the lease would severely prejudice the interests of the tribe. Validation of a lease is not, of course, the only kind of harm which requires that a tribe be deemed indispensable. *See Northern Cheyenne, etc. v. Adsit, supra,* 668 F.2d 1080 (action involving tribal water rights).

The first of the four factors enumerated in Subsection (b) of Section 389 therefore is clearly satisfied.

The second factor under Section 389(b) is the extent to which, by protective provisions in the judgment, prejudice to the absent party can be lessened or avoided. Here, that is not possible. As the decisions below illustrate, granting relief to Desert deprives the Band of the right to determine the circumstances under which it will allow outdoor advertising on its reservation lands. The possibility of such prejudice cannot be eliminated. Therefore, dismissal is required. *See Lomayaktewa v. Hathaway, supra,* 520 F.2d at 1326.

The third factor under Section 389(b) is whether the judgment rendered in the person's absence will be adequate. Here, any judgment in the tribe's absence is for all intents and purposes unenforceable: Naegele neither owns the signs nor has authority to remove them without the consent of the Band. Further, the Band is not a party to the judgment in this action. The situation is exactly like that in *Lomayaktewa v. Hathaway, supra*, where the plaintiffs sued to invalidate a lease between the Hopi Tribe, as lessor, and a non-Indian corporation, as lessee, but did not

name the tribe as a defendant. The Ninth Circuit considered it "perfectly apparent that any judgment rendered in the Tribe's absence would not be adequate." *Id.* at 1326.

The fourth factor is the adequacy of the plaintiff's remedies if the action is dismissed. Code Civ. Proc. § 389 (b). The plain fact of the matter is that Desert has mounted an action which ought properly to have been brought against the Band, not Naegele. However, the plaintiffs are barred absolutely from suing the Band; they can no more sue the Band here than they could anywhere else. Therefore, there is no underlying enforceable right of action; dismissal effects no deprivation of a right.

Desert's entire action must be dismissed, because the Morongo Band is an indispensable party that cannot be joined.

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CONCLUSION

For the reasons stated above, Naegele respectfully submits that Desert's petition for certiorari is without merit and should be rejected, or alternatively, that the action should be dismissed for failure to join an indispensable party who cannot be joined.

Dated: November 7, 1985

Respectfully submitted,

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APPENDIX 1

ADMINISTRATIVE APPEAL OF THE MORONGO BAND OF MISSION INDIANS

v.

AREA DIRECTOR, SACRAMENTO AREA OFFICE
7 IBIA 299

Decided *December 13, 1979*

Appeal from Area Director's decision disapproving a proposed lease of trust land for outdoor advertising purposes.

Reversed.

1. Act of Oct. 22, 1965—Bureau of Indian Affairs: Generally—Indian Tribes: Generally

Title I of the Highway Beautification Act, 79 Stat. 1028, which applies to all "public lands or reservations of the United States," does not apply to Indian Reservations.

2. Act of Aug. 15, 1953—Indian Tribes: Generally

Public Law 280, 67 Stat. 588-590, did not grant to states general civil regulatory powers over Indian reservations. Nor could this be accomplished by Departmental regulation, Secretarial Order or other directive.

3. Act of Oct. 22, 1965—Bureau of Indian Affairs: Generally—Indian Tribes: Generally

California's Outdoor Advertising Act, implementing the Highway Beautification Act, 79 Stat. 1028, may not be applied to non-Indian lessees on the Morongo Indian Reservation.

4. Act of Oct. 22, 1965—Bureau of Indian Affairs: Generally—Indian Tribes: Generally

The Department's policy established in 1965 of requiring lessees of Indian lands in California to comply with State standards regulating land use and development can be achieved without subjecting developing tribal governments to the full enforcement powers of the State, viz., through adding appropriate State standards to the provisions of any lease.

APPEARANCES: Stephen V. Quesenberry, Esq., California Indian Legal Services, for appellant; James E. Goodhue, Esq., Office of the Field Solicitor, U. S. Department of the Interior, Riverside, California, for respondent.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON
INTERIOR BOARD OF INDIAN APPEALS

The appeal decided here involves a claim by the Morongo Band of Mission Indians (appellant) that the Area Director, Bureau of Indian Affairs, Sacramento Area Office (respondent), erred in refusing to approve a lease agreement between the Band and the Naegele Outdoor Advertising Co., Inc. of California, for the purpose of erecting and maintaining outdoor advertising structures on the Morongo Indian Reservation.

The Area Director's decision at issue was rendered Mar. 14, 1978.[1] A notice of appeal was timely filed from this decision by California Indian Legal Services on behalf of appellant on Apr. 17, 1978, pursuant to 25 CFR Part 2. By memorandum dated Mar. 27, 1979, Acting Deputy Com-

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[1]The Area Director's decision affirmed a determination made by the Superintendent, Southern California Agency, BIA, dated Aug. 29, 1977.

missioner of Indian Affairs Martin E. Seneca, Jr., referred this appeal to the Board of Indian Appeals for resolution in accordance with the provisions of 25 CFR 2.19.[2]

In reviewing the decision appealed from and the briefs submitted by the parties, it is clear that resolution of this appeal depends primarily on the answer to the following question: To what extent, if any, does the Highway Beautification Act of 1965, 79 Stat. 1028, 23 U.S.C. § 131 (1976), apply to Indian reservations?

BACKGROUND

The genesis of this appeal can be traced to the struggle of the Morongo Band of Mission Indians to develop economically. This background is detailed in appellant's brief dated July 1, 1978, from which the following summary is adduced:

The Morongo Indian Reservation occupies approximately 32,300 acres of land in Riverside County, California, and is inhabited by nearly 300 members of the Morongo Band of Mission Indians. Because the reservation lies astride a narrow pass between the San Bernardino and

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[2]This regulation provides in relevant part:

"(a) Within 30 days after all time for pleadings (including extension granted) has expired, the Commissioner of Indian Affairs shall:

"(1) Render a written decision on the appeal or

"(2) Refer the appeal to the Board of Indian Appeals for decision.

"(b) If no action is taken by the Commissioner within the 30-day time limit, the Board of Indian Appeals shall review and render the final decision."

San Jacinto Mountain Ranges, only the few relatively flat acres located in the plain are suitable for economic development. A planning study conducted for the Band in 1972 identified a total of less than 1 square mile of reservation land as suitable for economic development. All of that land lies adjacent to Interstate Highway 10, which is a major east-west artery for travel to and from the metropolitan areas of southern California.

In addition to the Interstate Highway, the reservation is crossed by a main line of the Southern Pacific Railroad, the Colorado River Aqueduct, major oil tranmission [*sic*] pipelines, natural gas pipelines, and numerous electrical transmission lines, all of which serve the metropolitan Los Angeles area without any significant benefit to the reservation or its residents.

Despite the reservation's seemingly advantageous location for economic development, its economy is depressed and its population poor. The unemployment rate on the reservation is approximately 50 percent.

For many years a major source of income for the Morongo Band has been derived from outdoor advertising activities on tribal lands adjacent to Interstate Highway 10.[3] Because the foregoing lands consist of property held in trust by the United States for the benefit of the Morongo Band, any tribal lease of the property for business purposes requires approval by the Secretary of the Interior

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[3]In an appraisal report dated Oct. 13, 1977, the Southern California Appraisal Office, BIA, identified outdoor advertising as "the highest and best use of reservation lands along Interstate 10."

pursuant to the provisions of 25 U.S.C. § 415 (1976), and regulations found in 25 CFR Part 131. The Bureau has refused to approve the Morongo Band's advertising lease with the Naegele company on grounds that the outdoor advertising proposed in the lease violates requirements of the Highway Beautification Act and California State law promulgated thereunder.[4]

DISCUSSION, FINDINGS AND CONCLUSIONS

Certain preliminary questions are answered before we address the main issue. First, the Field Solicitor (who represents the Area Director on appeal) asserts that it is inappropriate for the Board to entertain this appeal because the issues involved are the subject of litigation in *State of California v. Naegele Outdoor Advertising Co. of California, Inc.*, No. 126069, Superior Court of the State of California, County of Riverside. This is an action brought by the State of California, through its Department of Transportation, against the Naegele company for violations of California's Outdoor Advertising Act, Bus. & Prof. Code §§ 5200-5486, allegedly committed by the company in advertising activities on the Morongo Reservation.

There are indeed questions of law at issue in the foregoing case which also arise in this administrative proceed-

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[4]The Area Director's decision does not recite specific findings of fact or conclusions of law. In lieu thereof, the Area Director states:

"In view of the Riverside Field Solicitor's Opinion: Secretarial Order of July 9, 1965. 30 F.R. 8722; Solicitor's Opinion dated April 7, 1967, and circumstances surrounding the lease proposal of Naegele Outdoor Advertising Company, I hereby affirm the Superintendent's decision of Aug. 29, 1977."

ing, such as whether the Congress intended the Highway Beautification Act to apply to Indian reservations. The precise issue in the State Court proceeding, however, does not involve the lease dispute now before the Board. In this regard, neither the Morongo Band nor the Department of the Interior is a party to the action. In the absence of any court injunction or Secretarial directive precluding the Board from deciding the subject appeal, there is no legal reason why the Board cannot do so. Further, considerations of policy do not favor the continuation of disputes which are ripe for decision. Here, appellant has been pursuing a final administrative determination from the Department for over 1½ years. For the above reasons, the Board rejects respondent's contention that consideration of this appeal should be deferred or denied.[5]

Subsequent to the Area Director's disapproval of the lease at issue, the Morongo Band entered into an "agency agreement" with the Naegele Company in March 1978. This agency agreement is explained by appellant in its brief dated July 1, 1978, as follows:

During the pendency of these various appeals, the Business Committee of the Morongo Band, pursuant to the authority vested in it through the Band's enactment of Proposition 4 at its General Election of December 14, 1963, continued to consider the possibility of establishing an outdoor advertising industry on the Morongo Indian Reservation because of its potential for creating employment for Band members and for creating an income for the Morongo Band. After

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[5]The Field Solicitor refers to another California suit. *State of California v. Hadley Fruit Co.*, Civ. No. 106415. Superior Court of California, County of Riverside, as one with a direct bearing on the issues before the Board. Appellant disagrees. The Board is informed that the above case has been settled.

lengthy deliberations, it was decided that the most advantageous and expeditious way for the Band to do so would be for the Band to establish its own outdoor advertising enterprise immediately. Because the Band lacked the necessary technical expertise to do so immediately, the Band engaged an agent to commence and to operate certain aspects of this enterprise for the Band during a period when the Band would acquire its own expertise in the business. The Band has entered into an Agency Agreement with its agent [Naegele Outdoor Advertising Company of California, Inc.] for this purpose.

The Field Solicitor submits that appellant is "attempting to convert the appeal from the refusal to approve the lease into an Interior Board of Indian Appeals' ratification of an agency agreement [summarized above] and the Band's operation of an outdoor advertising sign business." Answer Brief filed June 1, 1979, at 2. Appellant denies this charge and maintains that Departmental ratification of the Band's agency agreement with the company is not required. Appellant's Reply Brief filed June 22, 1979, at 1-2.

It is neither necessary nor appropriate for the Board to render an opinion regarding the March 1978 "agency agreement." The Board's jurisdiction in administrative appeals is limited to a review of specific action taken by BIA officials in the performance of their duties under Chapter I of Title 25 of the *Code of Federal Regulations.* 43 CFR 4.350-4.353. To our knowledge, no BIA action has been taken regarding the agency agreement.[6] If some

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[6]According to the Field Solicitor, "at no time was the so-called agency agreement ever presented to the Superintendent, Southern California Agency, or the Area Director, for approval." Answer Brief at 2.

BIA action has occurred regarding the agreement, it is not reviewable by this forum in the absence of a proper appeal therefrom.

Thus, the sole question to be decided here is whether it was error for the Area Director to disapprove the proposed lease of trust land on the Morongo Indian Reservation to the Naegele company[7]

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[7]The terms of the proposed lease are set forth in a letter to the Morongo Band Tribal Council from the Naegele Company, dated Aug. 10, 1977, which reads as follows:

"Gentlemen:

"Confirming our meeting and proposal to the Morongo Tribal Council on Aug. 8, 1977, we would like to propose the following for your approval.

"1. We would like to lease the North side of sections 10 and 12 and the South side of section 8 located on Freeway Interstate 10. We will only lease enough ground space to erect single pole signs. Each advertising structure will only have one pole with the ground base approximately thirty six inches in diameter.

"2. At this time, our plans call for fifteen different single pole structures, spaced approximately 1000 ft. apart. As we understand, your sections are one mile long on the freeway side. This will allow us to build five on each of the proposed sections.

"3. In order for Naegele to lease the above mentioned property, the Morongo Indians will have to own the poles for each advertising structure. Naegele will furnish and erect each pole and sell them to the Morongos for one dollar each. We can then lease the top of the pole for a total of $6,500 per year plus the annual increase as outlined on the attached page. At the end of our lease agreement we will buy back the poles for one dollar each or enter into a new lease at the agreement of both parties.

"4. The annual payment of $6,500 plus, will be made in annual installments in advance beginning Jan. 1, 1978. The payment schedule above will be established by the fact that

(Continued on following page)

The statutory authority which permits the leasing of Indian trust land for such business purposes as outdoor advertising is the Act of Aug. 9, 1955, 69 Stat. 539, *as*

(Continued from previous page)

we will have approval to start construction on the locations by October 1, 1977.

"5. In the event of future development of Morongo property, we will move our structure, including the pole fifty or one hundred feet or wherever it will not interfere with the development. This will be done at no cost to the Morongo Indians.

"6. The Hadley outdoor advertising signs can remain as far as we are concerned. But all other advertising signs will be removed by us as their leases expire with you. The reason for this is, we do not want to create outdoor advertising clutter. We would like to have an exclusive right to lease any and all property that you want to lease for advertising on any road or freeway. This will also allow you to expect and get prompt payment from one advertising company, the 3rd largest outdoor advertising company in the United States.

"7. In the event the state finds a way or passes a law to prevent Naegele from leasing the top of each of your single poles through condemnation or whatever, we will pay you the lease money owed through the day we are forced to take down our signs and poles.

"8. Naegele will maintain all advertising structures, including the poles at no cost to the Morongos. We will also assume all cost for illumination and service for the signs. Naegele will also carry all insurance for liability. We will at all times protect the interest of the Morongo Indians.

"9. We will only build standardized outdoor structures, 14′ x 48′ with space for extensions, please see photo, or we will not exceed 1,200 sq. ft. which will meet state approval.

"10. We will also need the right of ingress and egress of the premises to erect, place and maintain all advertising signs and structures and any equipment therefore and post, paint or illuminate and maintain advertisements or such structures.

Very Truly Yours
Leon E. Howell
President"

amended, 25 U.S.C. § 415 (1976). The Act provides that restricted Indian lands, whether tribally or individually owned, may be leased only with the approval of the Secretary of the Interior. In addition to prescribing the term of years for leases consummated under the Act, the statute provides:

> Prior to approval of any lease . . . the Secretary of the Interior shall first satisfy himself that adequate consideration has been given to the relationship between the use of the leased lands and the use of neighboring lands; the height, quality, and safety of any structures or other facilities to be constructed on such lands; the availability of police and fire protection and other services; the availability of judicial forums for all criminal and civil causes arising on the leased lands; and the effect on the environment of the uses to which the leased lands will be subject. [Act of June 2, 1970, § 2, 84 Stat. 303.]

The Department's regulations governing the leasing of Indian land are set forth in 25 CFR Part 131. These regulations are primarily aimed at insuring proper economic return to Indian lessors. *See* 25 CFR 131.5.

Based on the authorities incorporated by reference in the Area Director's decision (*see* n.4), it appears that the Area Director disapproved the proposed lease on grounds that California and Federal laws controlling outdoor advertising along Interstate Highways were not satisfied by the provisions of the lease.

On appeal the Morongo Band has presented a comprehensive attack on the validity of the Area Director's action. Among other things, the Band alleges the following:

1. The Highway Beautification Act does not apply to Indian reservation lands.

2. Neither the Highway Beautification Act, Public Law 280, or any other proper legal authority confers on California power to implement its Outdoor Advertising Act on Indian reservations.

3. The Highway Beautification Act and the California Outdoor Advertising Act do not apply to non-Indian lessees of Indian trust lands.

4. The policy of the Secretary of the Interior to apply state land use standards to leases of Indian trust lands can be accomplished without subjecting the Band to state jurisdiction and enforcement measures.

DOES THE HIGHWAY BEAUTIFICATION ACT APPLY TO INDIAN RESERVATION LANDS?

The Highway Beautification Act of 1965, *as amended,* was enacted by Congress to provide for scenic development and road beautification of the Federal-aid highway systems. Title I of the Act (23 U.S.C. § 131 (1976)) contains requirements for the control of outdoor advertising. At 23 U.S.C. § 131(h), the Act provides:

(h) All public lands or reservations of the United States which are adjacent to any portion of the Interstate System and the primary system shall be controlled in accordance with the provisions of this section and the national standards promulgated by the Secretary [in 1965, the Secretary of Commerce; now the Secretary of Transportation].

[1] In a memorandum opinion to the Commissioner of Indian Affairs dated Apr. 7, 1967, the Associate Solicitor for Indian Affairs concluded that "reservations of the United States" as used in subsec. (h) of 23 U.S.C. § 131 in-

cludes Indian reservation.[8] Upon careful review, we conclude that the Associate Solicitor's opinion does not reflect the state of the law on this subject.

The 1967 opinion relies primarily on the Department's disposition of three cases rendered over 65 years ago concerning rights-of-way across "reservations" for canal and ditch purposes.[9] At issue was whether the term "reservations" as used in the Act of Mar. 3, 1891, § 18, 26 Stat. 1101, 43 U.S.C. § 946 (1976), includes Indian reservations. The Department ruled in the affirmative and this position was followed by a Federal court in 1914. *United States v. Portneuf-Marsh Valley Irr. Co.*, 205 F.416 (E.D. Ida. 1913), *aff'd*, 213 F.601 (9th Cir. 1914).

As appellant argues on appeal, the Act of Mar. 3, 1891, vests power in the Secretary of the Interior to disapprove a right-of-way grant whenever he determines that approval thereof would be injurious to an Indian reservation.[10] On

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[8]In his concluding paragraph, the Associate Solicitor states that outdoor advertising on Indian reservation lands is subject "to regulations under the act." The opinion does not address whether outdoor advertising on Indian reservations is subject to both Federal and state regulation.

[9]27 L.D. 421 (1898), overruling 14 L.D. 265 (1892); 33 L.D. 363 (1905); and 42 L.D. 595 (1913).

[10]The statutory proviso reads in pertinent part: *"Provided*, That no such right of way shall be so located as to interfere with the proper occupation by the Government of any such reservation." 43 U.S.C. § 946 (1976). With respect thereto, see 27 L.D. 421, 423-424, 33 L.D. 563, 565 and 42 L.D. 595, 600, *supra*. In *U.S. v. Portneuf-Marsh Valley Irr. Co., supra*, the Federal district court stated:

"It is pointed out that there is no apparent reason why an Indian reservation should not be subject to the grant of a right of way the same as any other reservation, especially in view of the fact that the Executive Department having jurisdiction thereof may determine whether a right of way can be granted without injury to the general purpose of the reservation, and extend or withhold approval accordingly." 205 F. 416, 419.

the other hand, the Highway Beautification Act of 1965, which relies on state action to enforce its standards, *see* 23 U.S.C. § 131(b)-(k) (1976), contains no special protection for Indian interests.

One indication that the Department has not considered the Highway Beautification Act applicable to Indian lands is its own regulatory response to the statute. In December 1970, the Secretary issued regulations invoking and expanding the outdoor advertising standards of the Highway Beautification Act with respect to public lands managed by the Bureau of Land Management. 43 CFR 2921.0-6. No such regulations have been issued by the Secretary with respect to Indian lands.

That the Highway Beautification Act was not intended to apply to Indian reservations is apparent from the enforcement provisions of the law. Under the Act, states are subject to a 10 percent reduction in Federal highway funds if they fail to regulate outdoor advertising in accordance with national standards. 23 U.S.C. § 131(b). States are authorized to employ their zoning or condemnation powers to achieve compliance with the Act. Sec. 131 (d)-131(g); 23 CFR 750.301-308. States may even impose stricter limitations than are found in the Act in controlling outdoor advertising. Sec. 131(k); 23 CFR 750.110, 750.155.

For the above measures to be taken by states on Indian reservations two well-established legal principles are necessarily forsaken: first, that tribally owned Indian reservation land is not subject to state powers of eminent domain. *Minnesota v. United States*, 305 U.S. 382 (1939); *United States v. 10.69 Acres of Land*, 425 F.2d 317 (9th

Cir. 1970),[11] and second, that states are not authorized to enforce their land use regulations on Indian reservations. *Santa Rosa Band of Indians v. Kings County,* 532 F.2d 655 (9th Cir. 1975. *cert. denied,* 429 U.S. 1038 (1977).

Unquestionably, the Congress, which has plenary authority over Indian affairs, *United States v. Kagama,* 118 U.S. 375 (1886), has the power to subject Indian reservations to the type of state regulation generally authorized in the Highway Beautification Act. However, based on principles enunicated by the Supreme Court in *Williams v. Lee,* 358 U.S. 217 (1959), regarding the limits of state power over Indian affairs, it is the Board's position that absent clear Congressional license to the states to control outdoor advertising on Indian reservations, such an intrusion by the states into "the right of reservation Indians to make their own laws and be ruled by them" is without sanction.

The term "reservations" is one broadly used "to describe any body of land, large or small, which Congress has reserved from sale for any purpose." *United States v. Celestine,* 215 U.S. 278 (1909). It may include military reservations, national forests, national parks, or any other Federally protected reserve.[12] Indian reservations are

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[11]Allotted lands are subject to state condemnation. Act of Mar. 3, 1901. 31 Stat. 1084, 25 U.S.C. §257 (1976).

[12]In concluding that the phrase "public lands and reservations of the United States" as found in the Act of Mar. 3, 1891, included Indian reservations, the Appeals Court noted in *United States v. Portneuf-Marsh Valley Irr. Co., supra,* that "[a]t the date of that act the Indian reservations were the only considerable reservations of the United States." 213 F. 601, 603.

unique, however, since vital rights are vested in the Indians and tribes located thereon. Appellant refers to the Buck Act[13] as a clear example of Congressional recognition that Indian reservations are distinguishable from all other Federal reservations. As originally proposed, this Act would have allowed a state to impose its sales tax, use tax or income tax within "Federal areas," alternatively described as Federal "reservations" in the title of the bill. A series of inquiries from the Department of the Interior eventually led to a clarifying provision in the bill excepting reservation Indians from the coverage of the Buck Act.[14]

In the case before us, absence of statutory language expressly including or excluding Indian reservations as territory subject to the Highway Beautification Act renders the term "reservations" as used in sec. 131(h), ambiguous. This ambiguity has been recognized by the Department of Transportation, the Federal agency primarily responsible for national enforcement of the Act. By memorandum dated Dec. 19, 1977, an assitant [*sic*] chief counsel of the Federal Highway Administration furnished the Department of the Interior with a draft proposed amendment to 23 U.S.C. § 131(h) aimed at bringing Indian reservation areas within certain coverages of the Highway Beautification Act.[15]

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[13]Act of July 30, 1947, 61 Stat. 641, 4 U.S.C. §§ 104-110 (1976).

[14]4 U.S.C. § 109 (1976). See Appellant's opening brief filed July 5, 1978, at 4-7.

[15]See pp. 41-46, Appellant's Attachments to Brief on Appeal, filed July 5, 1978. Among other things, the draft amendment called for a voluntary removal program on Indian reservation lands of nonconforming outdoor advertising signs.

To our knowledge, the legislative history of 25 U.S.C. § 131 (1976) reveals no reference to Indian reservations whatsoever. However, implicit in statements of the House Public Works Committee regarding the legislation is the recurring theme that enforcement of the Act could effectively be achieved through the zoning and condemnation powers enjoyed by states. House Report No. 1084, 89th Congress, 1st Sess., found in 1965 *U.S. Code Cong. & Adm. News*, pp. 3710-3736.[16] As previously stated, however, we believe these powers may be exercised by states on Indian reservations only when Congress expressly so authorizes. Under the circumstances, we find that the legislative history of the Highway Beautification Act supports the conclusion that Congress did not intend to include Indian reservations within the class of reservations affected thereby.

In ascertaining this intent of Congress, it is instructive that Indian lands are specifically identified in other Acts relating to the Federal-aid highway systems as appropriate. *See* 23 U.S.C. §§ 101(a), 103(b)(1), 120(a), 120(f), 120(g), 125(c), 203, 208, and 217(c). Congress obviously knew when and how to include language relating to Indian reservations in its Federal highway plan.

Appellant submits that in accordance with recognized canons of construction, doubtful satutory language must be interpreted in favor of the Indians. This is undoubtedly

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[16]The regulations of the Federal Highway Administration concerning condemnation under the Act specify that they "should not be construed to authorize any additional rights in eminent domain not already existing under State law or under 23 U.S.C. 131(g)." 23 CFR 750.301.

true with respect to Federal statutes dealing with Indians. *Worcester v. Georgia*, 31 U.S. (6 Peters) 214, 261 (1832); *Santa Rosa Band of Indians v. Kings County, supra; State of Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, — U.S. —, 58 L.Ed.2d 740, 758 (1979). Where the Federal statute involved is one of general applicability, such as the Highway Beautification Act, some courts are prone to apply normal rules of construction instead of rules which favor Indians. *See United States v. Allard*, 397 F. Supp. 429 (D. Mont. 1975); *cf. United States v. White*, 508 F.2d 453 (8th Cir. 1974).

In this case, it cannot be said that Indians are similarly affected as the general public if sec. 131(h) is deemed applicable to Indian reservations. Such a ruling would significantly alter the tribal sovereignty possessed by Indian nations. Since states have the authority under the Act to impose standards stricter than in the Act itself, such a ruling could mean economic termination of a tribe such as the Morongo Band whose primary source of income is derived from outdoor advertising. Because of the unique tribal interests at stake here, it is not inappropriate to apply the rules of construction urged by appellant, notwithstanding the general nature of the Act in question. So doing, we are all the more satisfied that Congress did not intend the Highway Beautification Act to apply to Indian reservations.

PUBLIC LAW 280 AND DEPARTMENTAL STANDARDS

[2] The Field Solicitor submits that the California Outdoor Advertising Act may be enforced on Indian reservations by virtue of a Secretarial Order of July 2, 1965,

published at 30 FR 8722. This directive (signed by Under Secretary John A. Carver) provides in part:

> Pursuant to § 1.4(b), Title 25, Code of Federal Regulations (30 F.R. 7520), the Secretary of the Interior does hereby adopt and make applicable subject to the conditions hereinafter provided, all of the laws, ordinances, codes, resolutions, rules or other regulations of the State of California, now existing or as they may be amended or enacted in the future, limiting, zoning, or otherwise governing, regulating, or controlling the use or development of any real or personal property, including water rights, leased from or held or used under agreement with and belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States and located within the State of California.

The Field Solicitor points out that the above Secretarial directive has been construed by a California court as vesting the State with authority to apply its laws to lessees of Indian lands. *County of San Bernardino v. LaMar*, 76 Cal. Rptr. 547 (1969).

In a March 1970 opinion, former Secretary of the Interior Walter J. Hickel clarified the Department's position with respect to the 1965 Secretarial directive and expressly stated that the Department had no intention of following the ruling in *County of San Bernardino, supra*, noting that the United States was not a party to the litigation and had no notice of its pendency,[17] Secretary Hickel stated that,

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[17]Mr. Hickel's opinion appears as appendix A to Appellants' Supplemental Statement in Support of Appeal, filed May 3, 1979. It is an unpublished opinion directed to interested parties in the zoning of lands of the Agua Caliente Indian Reservation in Palm Springs.

at most, California laws were noticed by the Department as standards for the agency to follow in approving leases of Indian land.

The Secretarial directive of 1965 and 25 CFR 1.4(b) are apparent attempts of the Department to apply or interpret the aims of Congress in its enactment of the Act of Aug. 15, 1953, 67 Stat. 588-590, *as amended*, commonly known as Public Law 280.[18] In 1976, the Supreme Court rendered the definitive decision that Public Law 280 did not grant to states general civil regulatory powers over Indian reservations. *Bryan v. Itasca County*, 426 U.S. 373, 390 (1976). The Court's decision in *Bryan* is consistent with Mr. Hickel's 1970 opinion that the Secretarial directive of 1965 was not a general jurisdictional grant to California to apply its regulatory laws in Indian country. Clearly, only Congress may accomplish such a result.

The Field Solicitor further contends that the California Outdoor Advertising Act is a prohibitory statute and thus comes within the purview of the criminal jurisdiction provisions of Public Law 280. It is the case that California has made any violation of its Act a misdemeanor. *Bus. and Prof. Code*, § 5464.

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[18]The 1965 order contains the following proviso: "Nothing contained in this notice shall be construed in any way to alter or limit the provisions of sections 2(b) and 4(b) and (c) of the Act of August 15, 1953 (67 Stat. 589)." Several commentators have questioned the validity of 25 CFR 1.4 (see *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 U.C.L.A. L. Rev. 535, 586 (1975), by Goldberg. *Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands*, 26 Stan. L. Rev. 1061, 1091 (1974), by Chambers. In *Norvill v. Sangre de Cristo Dev. Co.*, 372 F. Supp. 348 (D.N.M. 1974), 25 CFR 1.4 was declared unconstitutional for lack of congressional authorization.

Appellant submits that under the above theory virtually any state licensing or regulatory law could be converted to a "criminal" law by merely providing that violation thereof constitutes a criminnal offense. We agree with appellant that Indian reservations would obviously be subject to wholesale regulation by state legislatures under the above interpretation. Dictum in the Ninth Circuit's decision in *United States v. Marcyes,* 557 F.2d 1361, 1364, (9th Cir. 1977) indicates that such a procedure cannot be countenanced. We so hold here on the basis that the California Outdoor Advertising Act is clearly a regulatory law and does not fall within the criminal jurisdiction provisions of Public Law 280.

REGULATION OF
NON-INDIAN LESSEES

[3] The most difficult question in this appeal is whether the proposed lease with the Naegele company would be subject to state regulation if approved by the Department because of the non-Indian character of the enterprise. If so, the Bureau of Indian Affairs should possibly not be faulted for disapproving the lease if it fails to satisfy certain requirements of California's Outdoor Advertising Act.

In *Fort Mojave Tribe v. County of San Bernardino,* 543 F.2d 1253 (9th Cir. 1976), the Appeals Court reaffirmed its earlier holding in *Agua Caliente Band of Mission Indians v. County of Riverside,* 442 F.2d 1184 (9th Cir. 1971), *cert. denied,* 405 U.S. 933 (1972), that a state possessory interest tax could be imposed on non-Indian lessees of Indian trust land. The Board has carefully evaluated the foregoing decisions and related cases. In our

opinion, appellant has correctly distinguished the case at hand from those where courts have permitted state regulation of non-Indian lessees on Indian reservations:

> However, *Fort Mojave* and *Agua Caliente* are distinguishable from the situation of the Morongo Band on at least two basic points. First, different state statutes are involved which, if enforced against the non-Indian lessee, will have varying degrees of impact on tribal self-government. Assessment of a possessory interest tax on the leasehold interest of a non-Indian lessee is qualitatively different from enforcement of a land use statute (California Outdoor Advertising Act) against the same lessee. Second, a corollary of the first point, is the fact that assessment of a possessory interest tax is not an attempt by the State to exercise "general civil regulatory powers" [*Bryan, supra,* 426 U.S. at 390] over reservation lands.
>
> State laws regulating outdoor advertising, like other state zoning and land use laws, fall within *Bryan's* prohibition against the exercise of general state civil regulatory authority on Indian reservations, absent an express grant of such authority from Congress. Moreover, the assessment of a possessory interest tax on the non-Indian lessee, unlike the regulation of outdoor advertising, is not a regulation of the use of the land and results in less of an intrusion into the areas of retained tribal sovereignty and tribal self-government. [Footnote omitted.]

Appellant's Reply Brief, filed June 20, 1979, at 18.

That the effect of state regulation on tribal sovereignty bears on the validity of a state's jurisdiction is explained in *Williams v. Lee, supra,* and *Moe v. Confederated Salish and Kootenai Tribes,* 425 U.S. 463 (1976).

Here, we find the Morongo Band has made a persuasive showing, one which by proper accounts should have been attempted by its trustee,[19] that its self-government would be adversely affected by application of California's Outdoor Advertising Act to its non-Indian lessee.[20]

EXERCISE OF SECRETARY'S AUTHORITY

[4] Appellant observes that the Department's policy "to require lessees of Indian lands to comply with state *standards* regulating land use and development" as expressed in Secretary Hickel's 1970 opinion, "can be implemented without taking the drastic step of subjecting developing tribal governments to the full enforcement powers of the state." Appellant's Reply Brief at 20. The Band suggests that a reasonable approach would be to include State standards regarding placement, illumination, maintenance, etc., of outdoor advertising structures as provisions of any lease. The Board believes this to be a sound proposal. In undertaking this approach, however, the Bureau of Indian Affairs must insure that its own

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[19]Under the authority of the Mission Indian Relief Act of Jan. 12, 1891, 26 Stat. 712, the United States issued a patent on Dec. 14, 1908, declaring that it would hold the lands of the Morongo Indian Reservation "in trust for the sole use and benefit of the said Morongo Band or Village of Indians."

[20]"[T]ribal use and development of tribal property presently is one of the main vehicles for the economic self-development necessary to equal Indian participation in American life." *Santa Rosa Band of Indians v. Kings County, supra* at 664; *see also, Bryan, supra,* 426 U.S. 388, n. 14.

actions serve to protect tribal sovereignty.[21] This can be party [*sic*] accomplished by initially acquiring the Band's consent to the use of State standards.[22]

DISPOSITION

In accordance with the above discussion, findings and conclusions, the decision of the Sacramento Area Director dated Mar. 14, 1978, disapproving the proposed lease between the Morongo Band and the Naegele Company is vacated. This matter is remanded to the Acting Deputy Commissioner of Indian Affairs with instructions that the Bureau of Indian Affairs seek to effectuate a business lease for outdoor advertising between the Morongo Band and the Naegele Company consistent with this opinion.

In accordance with the authority delegated the Board under 43 CFR 4.1, this decision is final for the Department.

Wm. Philip Horton,
Chief Administrative Judge.

We Concur:

Franklin Arness,
Administrative Judge.

Mitchell J. Sabagh,
Administrative Judge.

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[21]That this duty is incumbent on the Bureau of Indian Affairs in acting on proposed leases of Indian lands is addressed in Mr. Chambers' article cited in n. 18.

[22]This procedure is desirable to bring the Secretarial directive of 1965 into compliance with the 1968 amendments of Public Law 280 regarding tribal consent. Act of Apr. 11, 1968, 82 Stat. 78-80, 25 U.S.C. §§ 1321-22 (1976). Tribal consent should not be a problem in this case. The Morongo Band has suggested the use of State law as a standard for regulating outdoor advertising on its reservation, and, in addition, the Band has repeatedly expressed its commitment to the general purposes of the Highway Beautification Act. See Appellant's Brief filed May 3, 1979, at 4; Appellant's Brief filed June 24, 1979, at 18-19.

APPENDIX 2

Approved for a period of 10 years retroactive to the execution of the Agency Agreement on March 30, 1978 as entered into by Thomas Lyons, Chairman, Morongo Band of Mission Indians and Leon E. Howell, President, Naegele Outdoor Advertising Company of California, Inc.

This document is executed pursuant to Sacramento Area Office Redelegation of Authority Order No. 1, July 3, 1978, which specifies under Section 2.3, that the Superintendent may exercise the authority of the Area Director in relation to the following: (f) all those matters set forth in 25 CFR 131 (now 162), except for leases and permits with terms in excess of ten (10) years. Therefore, the Acting Superintendent, Southern California Agency, herein exercises the redelegated authority. If the original agreement is unavailable, the Southern California Agency will prepare an approval page for attachment to the copy, with appropriate references to that certain agreement, entered into by the parties on March 30, 1978.

Where references are made to the Band as to approvals, consents and authorizations, the words "and the Secretary" will be added after Band.

Approved in accordance with the letter of the Area Director, Sacramento Area Office, dated November 15, 1983, a copy of which by this reference is made a part hereof. See Exhibit "A".

Approved February 2, 1984 reactive [*sic*] to March 30, 1978.

/s/ William H. Gianelli
Acting Superintendent
Pursuant to the authority delegated by
209 DM 8, 10 BIAM 3.1, and Sacramento
Area Office Redelegation Order No. 1
(43 F.R. 30131).

APPENDIX 3

EXHIBIT "A"

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS

Sacramento Area Office
2800 Cottage Way
Sacramento, Caliifornia 95825

(SEAL)

November 15, 1983

Barbara E. Karshmer, Esq.
Attorney at Law
925 N Street, Suite 150
Fresno, California 93721-2256

Dear Ms. Karshmer:

This refers to your letter of October 27, 1983, concerning an Agency agreement between the Morongo Band of Mission Indians and Naegele Outdoor Advertising Company. The matter was the subject of a decision from the Interior Board of Indian Appeals which held that a contemplated lease of certain lands on the Morongo Indian Reservation for outdoor advertising purposes would not be regulated by State law or the Highway Beautification Act.

Your letter requests that the Bureau of Indian Affairs seek to "effectuate a business lease for outdoor advertising between the Morongo Band and the Naegele Company," as directed by the Interior Board of Indian Appeals, in the approval of the agency agreement executed between the Band and Naegele, on March 30, 1978. You further requested that said approval be issued retroactively to March 30, 1978, in view of the Interior Board of Indian

Appeals' decision and in order that the Band may attempt to persuade the Ninth Circuit Court of Appeals to remand the case of *U.S. ex rel Buxbom v. Naegele,* to the District Court for a new decision in light of the changed facts.

Sacramento Area Office Redelegation of Authority Order No. 1, July 3, 1978, specifies under Sec. 2.3, that the Superintendents and the Director, Palm Springs Office, may exercise the authority of the Area Director in relation to the following: (f) all those matters set forth in 25 CFR 131 (now 162), except for leases and permits with terms in excess of ten (10) years. Therefore, the Superintendent, Southern California Agency, by copy of this letter, is requested to exercise his redelegated authority with respect to your request. You are requested to provide the Superintendent, with the original agreement, if at all possible. If the original agreement is unavailable, the Southern California Agency will prepare an approval page for attachment to the copy, with appropriate references to that certain agreement entered into by the parties on March 30, 1978.

It is suggested that where references are made to the Band as to approvals, consents and authorizations, that "and the Secretary" be added after Band.

Sincerely,
/s/ Jess T. Town
Area Director

cc: Superintendent, SCA, w/copy of incoming for action.

APPENDIX 4

Synopsis of Legal Opinion

Attorney: Marguerite L. Price

Date: Prepared Jan. 21, 1976

Signed Jan. 21, 1976

Issue: Whether § 131(h) of Title 23, United States Code, is applicable to Indian reservations, thereby providing a basis for jurisdiction to the States to enforce their respective laws, regulations, and rules promulgated pursuant to § 131, et seq., on Indian reservations.

Conclusion: Although statutory construction leads us to the conclusion that Indian reservations are technically within the meaning of the phrase "reservations of the United States" as used in P.L. 89-285, Highway Beautification Act of 1965, 79 Stat. 1028, failure of the Act to delegate either to the Federal Highway Administration, Department of Transportation, or to the Department of the Interior, the explicit authority to implement the Act on Indian reservations results in nonapplicability to Indian reservations due to: a. Lack of uniform civil jurisdiction of the States over Indian reservations, thereby resulting in irregular exercise of the States' police power through their zoning ordinances; b. Lack of authority of the States to condemn Indian reservation land; and c. Lack specific delegation by Congress to any Federal agency or department the necessary authority and jurisdiction to implement the Act on Indian reservations. The most logical and practical solution to this dilemma is for Congress to amend the Act to delegate specific jurisdiction and authority to an appropriate governmental agency to achieve uniform implementation of the Beautification Act on Indian reservations.

Applicable Statutes:

23 U.S.C. § 131, et seq.

25 U.S.C. §§ 311, 357, 1321-1326

28 U.S.C. § 1360 [Civil jurisdictions of States over Indians]

18 U.S.C. § 1162 [Criminal jurisdiction of States over Indians]

United States Constitution, Art I, sec. 8, cl. 3

Applicable Regulations:

23 CFR 750 Subpart D (1975)

Administrative Directives:

None

Precedent Opinions and Decisions:

Worcester v. Georgia, 31 U.S. 515 (1832)

United States v. Kagama, 118 U.S. 375 (1886)

Stone v. United States, 506 F. 2d 561 (C.A. 8, 1974), cert. den., 95 S. Ct. 1405 (1975)

Hamilton v. MacDonald, 503 F. 2d 1138 (C.A. 9, 1974)

Ortiz - Barraza v. United States, 512 F. 2d 1176 (C.A. 9, 1975)

Pyramid Lake Paiute Tribe of Indians v. Morton, 499 F. 2d 1095 (C.A.D.C. 1974), cert. den., 95 S. Ct. 1351 (1975)

Littell v. Nakai, 344 F. 2d 486 (C.A. 9, 1965), cert. den., 382 U.S. 986 (1966)

Iron Crow v. Oglala Sioux Tribes of Pine Ridge, Res., 231 F. 2d 89 (C.A. 8, 1956)

United States v. Blackfeet Tribe of Blackfeet Ind. Res., 364 F. Supp. 192 (D. Mont. 1973)

United States v. Forty-Three Gallons of Whiskey, 93 U.S. 188 (1876)

Dick v. United States, 208 U.S. 340 (1908)

Shoshone Tribe of Indians v. United States, 294 U.S. 476 (1937)

Choate v. Trapp, 224 U.S. 665 (1912)

Matter of Huff, 197 U.S. 488 (1905)

Groundhog v. Keeler, 442 F. 2d 674 (C.A. 10, 1971)

Confed. Salish & Koatenai Tribes v. State of Montana, 392 F. Supp. 1325 (D. Mont. 1975), U.S. App. Pndg., 44 L.W. 3005

Confed. Salish & Koatenai Tribes v. Mamen, 380 F. Supp. 452 (D. Mont. 1974)

McClanahan v. State Tax Commission of Arizona, 411 U.S. 164 (1973)

Aqua Caliente Band of Mission Ind. v. County of Riverside, 306 F. Supp. 279 (C.D. Calif. 1971), aff'd., 442 F. 2d 1184 (C.A. 9, 1971), cert. den., 405 U.S. 933, reh. den., 405 U.S. 1033 (1972)

Hallowell v. United States, 221 U.S. 317 (1911)

Nadeau v. Union Pacific R.R. Co., 253 U.S. 442 (1920)

United States v. Osage County, 251 U.S. 128 (1919)

Exparte Webb, 225 U.S. 663 (1912)

Blackfeather v. United States, 190 U.S. 368 (1903)

Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902)

Lone Wolfe v. Hitchcock, 187 U.S. 553 (1903)

United States v. Creek Nation, 295 U.S. 103 (1935)

United States v. 2,005.32 Acres of Land, 160 F. Supp. 193 (D. S.D. 1958), dism., 259 F. 2d 271 (C.A. 8, 1958)

United States v. 10.69 Acres of Land, Yakima County, 425 F. 2d 317 (C.A. 9, 1970)

F.P.C. v. Tuscarora Indian Nation, 362 U.S. 99 (1960)

Seneca Nation of Indians v. United States, 338 F. 2d 55 (C.A. 2, 1964)

United States v. 687.30 Acres of Land, State of Neb., 319 F. Supp. 128 (D. Neb. 1970)

Bennett County, South Dakota v. United States, 394 F. 2d 8 (C.A. 8, 1968)

Oneida Indian Nation of N.Y. St. v. County of Oneida, N.Y., 414 U.S. 661 (1974)

Snohomish County v. Seattle Disposal Co., 425 P. 2d (1967), cert. den., 389 U.S. 1016 (1967)

Aqua Caliente Band of Mission Ind. v. City of Palm Springs, 347 F. Supp. 42 (C. Calif. 1972)

Rincon Band of Mission Indians v. County of San Diego, 324 F. Supp. 371 (S.D. Calif. 1971), dism'd., 491 F. 2d 9 (C. A. 9, 1974)

Reference Book:

Federal Indian Law, (1958), compiled by the United States Department of the Interior; United States Printing Office, Washington, D.C.

Legal Articles:

"Judicial Review of Indian Treaty Abrogation, Etc.," 63 *California Law Review* 601 (May, 1975)

"Indian Title: The Rights of American Natives in Lands They Have Occupied Since Time Immemorial," 75 *Columbia Law Review* 654 (April, 1975)

"Judicial Enforcement of the Federal Responsibility Indians," 27 *Stanford Law Review* 1213 (May, 1975)

"Public Law 280: The Limits of State Jurisdiction Over Reservation Indians," 22 *U.C.L.A. Law Review* 535 (Feb., 1975)

"Federal Courts - Indian Jurisdiction, Etc.," 63 *Georgetown* 989 (March, 1975)

"The Extension of County Jurisdiction over Indian Reservations in California: Public Law 280 and the Ninth Circuit," 25 *Hastings Law Review* 1451 (May, 1975)

"The New York Indians' Right to Self-Determination," 22 *Buffalo Law Review* 985 (1972 - 1973)

"State Taxation-Federal Preemption of Taxation against the Backdrop of Indian Sovereignty," 49 *Washington Law Review* 191 (1973)

"Tribal Self-Government and the Reorganization Act of 1934" 70 *Michigan Law Review* 955 (1971 - 1972)

"The Indian Battle for Self-Determination," 58 *California Law Review* 445 (March, 1970)

"The Indian Bill of Rights and the Constitutional Status of Tribal Governments," 82 *Harvard Law Review* 1344 (1969)

"The Constitutional Rights of the American Tribal Indian," 51 *Virginia Law Review* 122 (1965)

Discussion: Indian reservations, that is, those lands held in trust by the United States for the beneficial use of the Indians, are interpreted to be within the meaning of the term "public lands and reservations" of 23 U.S.C. § 131(h). Section 131(h) provides for the application of control of outdoor advertising to:

> (h) All public lands or reservations of the United States which are adjacent to any portion of the Interstate System and the primary system shall be controlled in accordance with the provisions of this section and the national standards promulgated by the Secretary.

Support for this interpretation is lent from 23 U.S.C. § 101(a) which defines "Indian reservation roads and bridges" as:

> The term "Indian reservation roads and bridges" means roads and bridges, including roads and bridges on the Federal-aid systems, that are located within or provide access to an Indian reservation or Indian trust land or restricted Indian land which is not subject to

> fee title alienation without the approval of the Federal Government, or Indian and Alaska Native villages, groups, or communities in which Indians and Alaskan Natives reside, whom the Secretary of the Interior has determined are eligible for services generally available to Indians under Federal laws specifically applicable to Indians.

An Indian reservation has been described as land set aside from the public domain which the Indians have the right to use while the fee title is in the Federal Government:

> *** An Indian reservation is simply a part of the public domain set aside by proper authority for use and occupation by a group of Indians***.*** [*Federal Indian Law,* p. 20]

Similarly, the Department of the Interior also interprets that the term "reservation" includes by definition Indian reservations. (See attached memorandum by Richard F. Allan, Associate Solicitor, Indian Affairs, April 7, 1967.) However, we do not believe that inclusion of the term thereby delegates adequate jurisdiction and authority to any Federal governmental agency to implement the Beautification Act on Indian reservations. This is true despite our agreement with the statement (memorandum, p. 1): "Manifestly, these goals will be frustrated if some areas adjacent to highways, *viz.*, Indian reservations, are exempt from the provisions of the act." But endorsement of the Act by the Department of the Interior is insufficient to confer the necessary jurisdiction to implement the Act on Indian reservations. A review of the legislative history reveals an absence of pertinent and specific discussion by either the House or the Senate on § 131(h).

Nature and origin of Federal jurisdiction: However, the mere interpretation that § 131(h) includes Indian reserva-

tions within its provisions is an inadequate basis to answer the issue of whether or not § 131(h) empowers the States to enforce their respective laws, regulations, and rules regulating outdoor advertising over Indian reservations pursuant to 23 U.S.C. § 131. Due to the quasi-sovereign nature of Indian tribes and the "plenary" power of Congress over the Indians is is concluded that § 131(h) does not confer the necessary jurisdiction over Indian reservations to enable the States to regulate outdoor advertisinig on Indian reservations. Consideration of the origin of Congressional power over American Indians is helpful in understanding the semi-independent nature of Indian tribes and the comprehensive jurisdiction of Congress over Indian tribes.

A federally recognized Indian tribe has all the inherent rights of sovereignty as a quasi-sovereign nation except when limited by the United States. *Worcester v. Georgia*, 31 U.S. 515 (1832); *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164 (1973); *United States v. Kagama*, 118 U.S. 375, 381 (1886); *Stone v. United States*, 506 F.2d 561, 563-564 (C.A. 8, 1974), cert den., 95 S.Ct. 1405 (1975); *Ortiz-Barraza v. United States*, 512 F. 2d 1176, 1179 (C.A. 9, 1975); *Pyramid Lake Paiute Tribe of Indians v. Morton*, 499 F. 2d 1095, 1097 (C.A.D.C.,1974), cert. den., 95 S. Ct. 1351 (1975); *Littell v. Makai* 344 F. 2d 486, 488 (C.A. 9, 1965), cert den., 382 U.S. 986 (1966); *Iron Crow v. Oglala Sioux Tribes of Pine Ridge Res.*, 231 F. 2d 89, 91-94 (C.A. 8, 1956); *United States v. Blackfeet Tribe of Blackfeet Ind. Res.*, 364 F.Supp. 192, 195 (D. Mont. 1973). Only one provision of the United States Constitution specifically grants Federal authority over Indian tribes, that is, the regulation of commerce. U.S. Const., Art. I. Sec. 8, cl. 3. See *United*

States v. Forty-Three Gallons of Whiskey, 93 U.S. 188 (1876); *Dick v. United States,* 208 U.S. 340 (1908).

While Federal authority as exercised by Congress is subject to the limitations of the Constitution, such authority is generally described as "plenary." *Shoshone Tribe of Indian v. United States,* 294 U.S. 476 (1937); *Choate v. Trapp,* 224 U.S. 665 (1912); *Matter of Huff,* 197 U.S. 488 (1905); *Groundhog v. Keeler,* 442 F. 2d 674, 678 (C.A. 10, 1971); *Confed. Salish & Kootenai Tribes v. State of Montana,* 392 F. Supp. 1325, 1328 (D. Mont. 1975), U.S. App. Pndg. 44 L.W. 3005; *Confed. Salish and Kootenai Tribes v. Mamen,* 380 F. Supp. 452, 463. (D. Mont. 1974); *Agua Caliente Band of Mission Ind. v. County of Riverside,* 306 F. Supp. 279, 282-283 (C.D. Calif. 1971), aff'd., 442 F. 2d 1184 (C.A. 9, 1971), cert. den., 405 U.S. 933, reh. den., 405 U.S. 1033 (1972); *United States v. Blackfeet Tribe of Blackfeet Ind. Res.,* 369 F. Supp. 562 (D. Mont. 1973). Regulation by the Federal Government does not require the consent of Indian tribes. *Federal Indian Law,* pp. 26-27. Furthermore, Congress has exclusive control over public domain and other property belonging to the United States unless it specifically delegates the sharing of such jurisdiction to the States. See *Hallowell v. United States,* 221 U.S. 317, 323-324 (1911); *Federal Indian Law,* p. 32; *Hamilton v. MacDonald,* 503 F.2d 1138 (C.A.9, 1974).

Necessity for the Exercise of Eminent Domain Power: In order to enforce the policies of the Federal Highway Administration regarding the regulations on outdoor advertising signs, a state is to exercise its power of eminent domain as necessary pursuant to 23 CFR Subpart D Section 750.301, et seq.:

> Section 750.301 To prescribe the Federal Highway Administration (FHWA) policies relating to Federal participation in the costs of acquiring the property interests necessary for removal of non-conforming advertising signs, displays and devices on the Federal-aid primary and Interstate Systems, including tool sections on such systems, regardless of whether Federal funds participated in the construction thereof. This regulation should not be construed to authorize any additional rights in eminent domain not already existing under State law or under 23 U.S.C. 131(g).

But only the Federal Government can exercise power of eminent domain over Indian reservations or otherwise dispose of tribal property. States do not have such power over Indian reservation lands in their own right. Traditionally, Congress has not hesitated to exercise its plenary power over tribal property. See *Nadeau v. Union Pacific R.R. Co.*, 253 U.S. 442 (1920); *United States v. Osage County*, 251 U.S. 128 (1919); *Exparte Webb*, 225 U.S. 663 (1912); *Choate v. Trapp*, 224 U.S. 665 (1912); *Blackfeather v. United States*, 190 U.S. 368 (1903); *Cherokee Nation v. Hitchcock*, 187 U.S. 294 (1902).

A corrollary to the principle of Congress' plenary power over tribal land is that such control over Indian land is political in nature and may not be exercised by the courts. See *Lone Wolfe v. Hitchcock*, 187 U.S. 553, 565 (1903). However, the term "plenary authority" has been interpreted to be something less than absolute control without compensation to the Indians for land acquired according to the Supreme Court in *United Statecs v. Creek Nation*, 295 U.S. 103, 110 (1935):

> It [plenary power does] not enable the United States to give the tribal lands to others, or to appropriate them to its own purposes, without rendering or assuming an obligation to render, just compensation for

> them; for that "would not be an exercise of guardianship, but an act of confiscation."***

In the construction of public highways by the State through Indian reservation lands or allotted land over which the allottee does not have full power of alienation, Federal jurisdiction still prevails and the State must seek permission to build the highways from the Secretary of the Interior, 25 U.S.C. 311:

> The Secretary of the Interior is authorized to grant permission, upon compliance with such requirements as he may deem necessary, to the proper State or local authorities for the opening and establishment of public highway, in accordance with the laws of the State or Territory in which the lands are situated, through any Indian reservation or through any lands which have been allotted in severalty to any individual Indian under any laws or treaties but which have not been conveyed to the allottee with full power of alienation.

While the authority per se of the Federal Government to exercise its power of eminent domain for public purposes over Indian reservations is widely recognized, there have been diverse opinions rendered as to whether or not the Federal authorizing statutes must specifically include Indian reservations. In *United States v. 2,005.32 Acres of Land*, 160 F. Supp. 193, 196 (D. S.D. 1958), dism., 259 F. 2d 271 (C.A. 8, 1958). The district court granted the Tribe's motion to dismiss the Federal condemnation suit for the acquisition of a portion of the Standing Rock Indian Reservation for the Oahe Dam and Reservoir Project in the absence of specific authorizing legislation. However, on appeal by the United States, the appellate court vacated the judgment and remanded the case to the district court with directions to dismiss it as moot.

The Ninth Circuit has held that Indian lands may be acquired by a general authorization statute without making a specific reference to Indian lands in *United States v. 10.69 Acres of Land, Yakima County,* 425 F. 2d 317, 320 (C.A. 9, 1970). In so ruling the appellate court relied on *F.P.C. v. Tuscarora Indian Nation,* 362 U.S. 99, 116-120, (1960); *Seneca Nation of Indians v. United States,* 338 F. 2d 55, 56-57 (C.A. 2, 1964).

> ***Congress need not itself specifically and expressly authorize by "special enactment" each particular taking of Indian land, but can choose to delegate some of its authority to admiinstrative offices and agencies. *** *Seneca Nation of Indians, supra,* pp. 56-57.

In the *Yakima County* case, *supra,* the appellate court held that only the Secretary of the Department of Transportation may acquire Indian trust lands for public highway purposes and only after complying with certain administrative procedures as provided for in 23 U.S.C. Section 107(d) and 317. Clearly, by inference the Court believes acquisition of land held in trust by the United States for the benefit of the Confederated Tribes and Bands of the Yakima Indian Nation to have been beyond the jurisdiction and authority of the State of Washington. *10.69 Acres of Land, Yakima County, supra,* pp. 18-19. See *United States v. 687.130 Acres of Land, State of Neb.* 319 F.Supp. 128, 113 (D. Neb. 1970). In *Bennett County, South Dakota v. United States,* 394 F. 2d 8, 15-16 (C.A. 8, 1968), the court admonished the County for not seeking the required permission of the Secretary of the Interior pursuant to 25 U.S.C. Section 311 and 357 rather than attempting to acquire land within and Indian reservation strictly on its own authority. The Supreme Court ruled that certain land

owned in fee simple by the Tuscarora Indian Nation could be acquired and flooded for a storage reservoir needed in conjunction with a hydraulic power project by the Power Authority of the State of New York pursuant to a license granted it by the Federal Power Commission in accordance with 16 U.S.C. § 836a. It held that the term "reservation" in the Federal Power Act, § 3(2), as amended, 16 U.S.C. § 796(2) includes only these lands owned by the United States. *Tuscarora Indian Nation, supra.* While it should be distinguished that the reference was to those interests held in fee simple by the Indians, the Federal Power Act specially provided for the use of property owned by the United States. When such property was needed "reasonable annual charges" were to be paid to the United States pursuant to 16 U.S.C. § 803(e). The Supreme Court inferred that the Act did not authorize the condemnation of any lands or interests owned by the United States, but only because of the provision for the annual charges. However, 23 U.S.C. § 131; et seq., neither authorizes the States to acquire any Indian reservation land nor delegates such authority to any Federal agency. Certainly, the statement of Federal participation in the cost of paying just compensation for the removal of signs by the States, 23 U.S.C. § 131(g) cannot be interpreted as either expanding the States' power of eminent domain or authorizing acquisition of signs on federally owned land.

Lack of Uniform Civil Jurisdiction of the States over Indian Law Reservations: Traditionally, the scope of civil jurisdiction and authority of the States over Indian reservation lands has been quite limited. This restrictive interpretation of the State's jurisdiction is based on two theories: 1. The concept that the existence of jurisdiction over Indian reservation lands in the Federal Govern-

ment precluded the States from having such jurisdiction; and 2. Indian tribes were considered to be semi-sovereign nations. The following explanation of the origin of the preemption theory was given in *Federal Indian Law*, p. 3:

> The fact that Indian tribes are largely exempt from the operation of local law derives from the fact that the Constitution of the United States rests in the National Government rather than in the States he three powers upon which the law pertaining to Indian affairs is primarily based—the warmaking power [Constitution, art. I, sec. 8, cl. 11], the treaty making power [Constitution, art. II, sec. 2, cl. 2], and the power to regulate commerce [Constitution, art. I, sec. 8, cl. 3] with Indian tribes.*** [Footnote omitted.]

Eleven States initially disclaimed jurisdiction over Indian lands, including Indian reservation land, in their State constitutions at the time they received statehood. This disclaimer, however, is not to be interpreted as a total disclaimer of jurisdiction over the actions of Indians. These States are:

1) *Alaska:* Ala. Const., Art. 12 § 12; Enabling Act, 72 Stat. 339 § 4, as amended, 73 Stat. 141.

2) *Arizona:* Ariz. Const., Art 20; Enabling Act, 36 Stat. 568; § 19; Joint Resol., 37 Stat. 39; Pres. Procl. 37 Stat. 1728.

3) *Idaho:* Ida. Const., Art 21 § 19; Enabling Act, 26 Stat. 215.

4) *Montana:* Mont. Const., Ord. I § 2, Enabling Act, 25 Stat. 676 §§ 4 and 10; Pres. Procl. 26 Stat. 1551.

5) *New Mexico:* N. Mex. Const., Art 21 §§ 2 and 10; Enabling Act, 36 Stat. 557; Joint Resol., 37 Stat. 39; Pres. Procl., 37 Stat. 1723.

6) *North Dakota:* N. Dak. Const., Art. 16; Enabling Act, 25 Stat. 676 §§ 4 and 10; Pres. Procl., 26 Stat. 1548.

7) *Oklahoma:* Okla. Const., Art. I. § 3; Enabling Act, 34 Stat. 267 §§ 1, 2, and 3; Pres. Procl., 35 Stat. 2160.

8) *South Dakota:* S. Dak. Const., Art. 22 § 2; Enabling Act, 25 Stat. 676 §§ 4 and 10; Pres. Procl., 26 Stat. 1549.

9) *Utah:* Utah Const., Art. 3; Enabling Act, 28 Stat. 107 § 3; Pres. Procl., 29 Stat. 876.

10) *Washington:* Wash. Const. Art. 26; Enabling Act, 25 Stat. 676; Pres. Procl., 26 Stat. 1552.

11) *Wyoming:* Wyo. Const., Art. 21 § 26; Enabling Act, 26 Stat. 222.

Specific subsections (d) and (1) of 23 U.S.C. 131 refers to "zoned commercial and industrial areas" and "unzoned commercial and industrial areas" in regard to the control of outdoor advertising. Regulation of land use through zoning ordinances is a function of the States' police power. By the terms of § 131, it is intended that its provisions be applied in conjunction with certain designated zoned and unzoned areas adjacent to the Interstate and primary systems as further specified. In order for States to enforce effectively their respective laws, regulations, and rules controlling outdoor advertising on Indian reservations, they must first have and exercise jurisdiction over Indian reservation lands. Obviously, a serious problem of uniform implementation of the provisions of § 131, et seq., arises in view of the States which specifically disclaimed such jurisdiction.

In 1953, Congress enacted Public Law 280, 67 Stat. 588, (see 28 U.S.C. 1360 and 18 U.S.C. 1162) conferring civil and criminal jurisdiction respectively upon those States which were willing to assumed [*sic*] responsibility for the Indians in place of the Federal Government. Originally,

consent of the affected Indian tribes was not required. The jurisdictional was [*sic*] grant was limited, though, to the extent that its exercise was to be subordinate to and compatible with Federal treaties, agreements, statutes, or regulations concerning Indians "in areas of Indian country." 28 U.S.C. 1360(b) specifically prohibits "alienation, encumbrance, or taxation of any real or personal property including water rights, belonging to any Indian or any Indian tribe, band or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States***." See 18 U.S.C. § 1162 (b). There are differing judicial decisions as to whether the civil jurisdiction granted in 28 U.S.C. 1360 includes the police power of a State to impose its zoning ordinances on Indian reservations. The Washington Supreme Court did not believe that such police power was granted. *Snohomish County v. Seattle Disposal Co.*, 425 F. 2d 22 (1967), cert. den. 389 U.S. 1016 (1967).

The State of California assumed civil and criminal jurisdiction pursuant to Public Law 280 and maintained that counties have the right to impose their zoning ordinances over Indian reservations. Thus, in *Aqua Caliente Band v. City of Palm Springs*, 347 F. Supp. 42 (C. Calif. 1972), the district court held that the City of Palm Springs legally incorporated certain Indian reservation land into the city and that the City's zoning ordinances were applicable to Indian lands. However, one of the cases which the court relies on heavily was later dismissed for lack of a true case or controversy. See *Rincon Band of Mission Indians v. County of San Diego*, 324 F. Supp. 371, 376 (S.D. Calif. 1971), dism'd., 491 F. 2d 9 (C.A. 9, 1974). However, in this later case, the appellate court did not directly address

itself to the issue of the legality of the scope of the State assertion of jurisdiction over Indian reservations. Instead, the three consolidated cases were reversed and the complaints dimissed for lack of proper jurisdiction either by the district court or the appellate court.

To date, only six states have assumed civil and criminal jurisdiction over Indians on Indian reservations pursuant to 28 U.S.C. § 1360; 18 U.S.C. § 1162. They are: Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin. Alaska had previously disclaimed jurisdiction over Indian lands, however. Whether Public Law 280 was intended to extend the States' jurisdiction land was discussed in *Agua Caliente Band, supra,* p. 51 and the district court held that such jurisdiction was properly exercised by the State of California since the particular zoning ordinance in question did "not constitute any illegal interference with tribal sovereignty." However, the general rule remains well established that in the absence of Federal statutory guidance, only Federal statutory and judicial law applies to Indian reservations. *McClanahan v. State Tax Commission of Arizona,* 411 U.S. 164, 170-171, (1973). This rule is applicable to the original thirteen States, even these States in some instances executed treaties with Indian tribes prior to the United States doing so. *Oneida Indian Nation of N.Y. St. v. County of Oneida, N.Y.,* 414 U.S. 661, 674 (1974).

> On the contrary, "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." Rice v. Olson, 324 U.S. 786, 789 65 S. Ct. 989, 991, 89 L.Ed. 136, (1945). This policy was first articulated by this Court 141 years ago when Mr. Chief Marshall held that Indian nations were "distinct political communities, having terri-

> torial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States. Worcester v. Georgia, 6 Pet. 575, 557, 8 L.Ed. 483 (1832). It followed from this concept of Indian reservations as separate, although dependent nations, that State law could have no role to play within the reservation boundaries.*** *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 168, 93 S. Ct. 1257, 1260 (1973).

It is noted that in 1968, Congress repealed § 7 of Public Law 280 providing for the consent of Indian tribes to the assumption of criminal and civil jurisdiction over them, 25 U.S.C. § 1323(b), Public Law 90-284, 82 Stat. 79. Specific Federal deposition of certain Indian trust lands, allotted lands, and trust funds and the scope of Federal jurisdiction over various Indian tribes are set forth in 25 U.S.C. §§ 541-998.

In consideration of the aforementioned problems connected with the lack of uniform jurisdictinon, and specific rejection of jurisdiction in some instances, over Federal Indian reservation lands, we conclude that the penalty for noncompliance with the provisions of the Highway Beautification Act, 23 U.S.C. § 131(b), of a 10 per centum reduction of Federal-aid highway funds cannot be applied against those States which are otherwise in compliance with the Act. However, the States should be encouraged to the greatest extent practicable to seek and coordinate voluntary compliance by Indian tribes with the provisions of the Act. We further suggest that the States explore the possibility of obtaining Federal funding for such voluntary compliance.

In summary, we believe that the complexity of the problem of implementing the Federal provisions controlling outdoor advertising, 23 U.S.C. § 131, et seq., can best be solved by an act of Congress specifically making these provisions applicable to Indian reservations. Therein, jurisdiction could be designated to a Federal agency enabling it to designate land use analoguous to zoning ordinances, if necessary, and to acquire signs as needed through the exercise of eminent domain power. Separate approprations could be included for the costs to be incurred, especially for the just compensation of sign owners since it is unlikely that the various Indian tribes residing on reservation are either capable or willing to participate in the costs.

Prepared by:

/s/ Margarite L. Price
Date: January 21, 1976

Concur:

Date: _____

Adopted by:
Chief Counsel

Date: _____

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Nos. 85-615 and 85-639

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In the Supreme Court of the United States

OCTOBER TERM, 1985

CALIFORNIA DEPARTMENT OF TRANSPORTATION,
PETITIONERS

v.

NAEGELE OUTDOOR ADVERTISING COMPANY
OF CALIFORNIA, INC.

DESERT OUTDOOR ADVERTISING, INC., PETITIONER

v.

NAEGELE OUTDOOR ADVERTISING COMPANY
OF CALIFORNIA, INC.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the Highway Beautification Act of 1965 authorizes the states and third parties to seek enforcement of state laws regulating outdoor advertising, where the alleged violations occur on tribal trust lands located within a federal Indian reservation and are pursuant to a duly-approved agreement between the Indian tribe and a non-Indian lessee.

2. Whether, if the Highway Beautification Act does not make state laws regulating outdoor advertising enforceable on reservation trust lands, such state laws may nevertheless be enforced on such lands.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Title I of the Highway Beautification Act of 1965 (HBA), Pub. L. No. 89-285, 79 Stat. 1028, 23

U.S.C. 131, implements Congress's finding that "the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate Systems and the [federal-aid] primary system should be controlled in order to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty." 23 U.S.C. 131(a).[1]

Subsection (b) of Section 131 provides that if the Secretary of Transportation determines that a state has not provided for the "effective control" of outdoor advertising along Interstate highways, federal-aid highway funds apportioned to that state shall be reduced by 10% until the state does provide for such control.[2] Subsection (c) defines the term "effective control" to limit permissible billboards to five specific categories: (*i.e.*, directional and official signs, landmark signs and notices, signs advertising sale or lease of the property upon which they are located or advertising activities conducted on that property, and free coffee signs).[3] The Secretary is, however,

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[1] The four federal-aid highway systems, defined in 23 U.S.C. 103(a), include the primary and secondary systems, the urban system, and the Interstate System. The primary system consists of "an adequate system of connected main highways" selected by the state and approved by the Secretary of Transportation. Although Section 131 applies to both the primary system and the Interstate System, for simplicity herein we will refer simply to the Interstate System, which is the only one involved in this case.

[2] Subsection (*l*) provides, in substance, that a state may seek judicial review of the Secretary's final determination to withhold funds.

[3] The federal government will pay 75% of the just compensation for the removal of any outdoor sign lawfully

directed to provide, in consultation with the states, for areas in which other signs "giving specific information in the interest of the traveling public may be erected and maintained" (23 U.S.C. 131(f)). Such signs must conform to national standards to be promulgated by the Secretary (see 23 C.F.R. Pt. 750).[4] Finally, Subsection (h)—the provision at issue in this case—states:

> All public lands or reservations of the United States which are adjacent to any portion of the Interstate System and the primary system shall be controlled in accordance with the provisions of this section and the national standards promulgated by the Secretary.

2. As summarized by the court below, the evidence shows that the Morongo Band of Mission Indians, a federally-recognized Indian tribe, occupies the Morongo Indian Reservation, which consists of approximately 39,300 acres in Riverside County, California. The Reservation was created by a series of seven executive orders, a presidential proclamation, and a trust patent issued pursuant to the Mission Indian Relief Act of 1891, ch. 65, 26 Stat. 712. The Morongo Reservation lies astride a narrow pass between the San Bernardino and San Jacinto Mountain Ranges. Only a small portion of the Reservation is located on relatively flat land suitable for commercial develop-

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erected under state law but not permitted under 23 U.S.C. 131(c). See 23 U.S.C. 131(g). Subsection (k) provides that "[s]ubject to compliance with" the just compensation provision, a state may establish standards imposing stricter limitations than those required by the HBA.

[4] The HBA also specifies certain other exceptions to the general sign prohibition of Subsection (c). See Subsections (d), (e), (i), (n) and (o).

ment. These few acres are adjacent to Interstate Highway 10, connecting the Los Angeles area with the eastern part of the state. The Reservation's few natural resources yield little income, and many of the Morongo are unemployed and live in poverty. Pet. App. 14a-15a.[5]

For many years, the Band has derived a major part of its income from outdoor advertising. The Morongo [6] have determined that the highest and best use of the land adjacent to Interstate 10 is for outdoor advertising. This conclusion was confirmed by an appraisal report prepared by the Bureau of Indian Affairs of the Department of the Interior (BIA) in 1977. Pet. App. 14a-15a. The Morongo leased some Reservation land to non-Indian firms for billboards before 1977; in that year, proposals for further leases were solicited from several non-Indian firms, including respondent. Respondent's proposal was selected, and the proposed lease was submitted to the BIA for approval pursuant to 25 U.S.C. 415.[7] Pet. App. 15a-16a.

The Sacramento Area Director of the BIA initially denied approval on the grounds that the outdoor advertising contemplated by the proposed lease would violate the HBA and California's Outdoor Advertising Act, Bus. & Prof. Code § 5200 *et seq.* (West 1974). The Morongo appealed the Area Director's decision, and the Interior Board of Indian Appeals

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[5] "Pet. App." references are to the appendix in No. 85-615.

[6] References to the Morongo refer either to the general membership of the band or to their Tribal Council, authorized by the membership to negotiate advertising agreements (Pet. App. 15a).

[7] Section 415 requires the approval of the Secretary of the Interior for leases of restricted Indian lands.

reversed. *Morongo Band of Mission Indians* v. *Area Director*, 7 I.B.I.A. 299, 86 Interior Dec. 680 (1979) (85-639 Br. in Opp. App. 1). The Board concluded that the HBA and the California statute had no application on reservation trust lands. Accordingly, the Board remanded the matter to the BIA with instructions to seek to effectuate the proposed lease. Pet. App. 16a.

On March 30, 1978, during the pendency of the administrative appeal, the Morongo and respondent executed an "agency agreement" by which respondent agreed to erect 15 billboards on the Reservation and to pay the Morongo $60,000 for the right to be their agent and $250,000 ($25,000 per year for 10 years) for the privilege of operating the billboards (85-615 Br. in Opp. 3). Respondent then erected 16 billboards on the Reservation.[8] The agreement was ultimately submitted to the BIA, and approved under 25 U.S.C. 415 on February 2, 1984, retroactive to 1978 (Pet. App. 16a n.1). The agreement was deemed by the BIA to be a lease replacing the earlier proposed lease which was the subject of the administrative appeal. *United States ex rel. Buxbom* v. *Naegele Outdoor Advertising Co.*, 739 F.2d 473 (9th Cir. 1984), cert. denied, No. 84-709 (Jan. 7, 1985).

3. On July 10, 1978, the State of California commenced an action in the Superior Court of Riverside County seeking preliminary and permanent injunctions against respondent. The State's complaint alleged that respondent was in control of 16 outdoor advertising structures located adjacent to Interstate

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[8] Counsel for the respondent has advised us that, in addition to the 15 billboards contemplated by the 1978 agreement, one additional billboard was erected on Reservation land under a separate agreement between respondent and the Morongo.

Highway 10 in Riverside County, which were displayed without the permits required by Section 5350 of the California Business and Professions Code (West 1974). The complaint further alleged that the displays were situated in violation of various provisions of the State's Outdoor Advertising Act (*id.* §§ 5200 *et seq.*), and that they constituted a public nuisance within the meaning of Section 5461 of the Business and Professions Code (West 1974). Pet. App. 17a. The superior court, on November 6, 1981, entered summary judgment in favor of the State. *Ibid.*

Petitioner Desert Outdoor Advertising, Inc., also filed an action in the superior court against respondent, which was subsequently consolidated with the State's action. Petitioner Desert alleged causes of action for nuisance, unfair competition, intentional interference with prospective economic benefit and negligent interference with such benefit. Respondent's demurrer was sustained as to the nuisance action and both causes of action for interference were dismissed, but the district court granted Desert's motion for summary judgment on the unfair competition cause of action.[9] In its order, the court enjoined respondent from maintaining advertising structures on the Reservation without complying with the Outdoor Advertising Act, and ordered respondent to remove all noncomplying structures. Pet. App. 17a-18a. Enforcement of the judgment was stayed pending appeal. Pet. App. 18a.

The state appellate court affirmed (Pet. App. 47a-66a). It concluded that federal law did not preempt the State from enforcing its Outdoor Advertising Act

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[9] Cal. Bus. & Prof. Code § 17200 (West Supp. 1986) defines "unfair competition" to include an unlawful business practice (Pet. App. 31a).

on federal Indian Reservations. In reaching this conclusion, the court found that "the Highway Beautification Act specifically contemplated and authorized states to regulate outdoor advertising on Indian lands adjacent to Interstate Highways." Pet. App. 63a. The court also rejected respondent's contention that the action must be dismissed for failure to join an indispensable party, the Morongo Band. Pet. App. 64a-66a.

The California Supreme Court reversed (Pet. App. 13a-34a). Relying upon this Court's decisions in *Hancock* v. *Train*, 426 U.S. 167 (1976) and *EPA* v. *State Water Resources Control Board*, 426 U.S. 200 (1976), the court held that a "clear and unambiguous [congressional] mandate" was required to permit the State to enforce its outdoor advertising restrictions on structures located on federal lands. Examining the text of the HBA—including Subsection (h)—and the legislative history of the Act, the court found no authorization for the enforcement of state laws on such lands. Accordingly, it concluded that "even if Congress intended the outdoor advertising standards of the Highway Beautification Act to apply on Indian Reservations, it did not intend that these standards be enforced through the assertion of state power." Pet. App. 27a.[10] Instead, the court found that the HBA "reserved to federal authorities the responsi-

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[10] The court also ruled that the Act of Aug. 15, 1953, ch. 505, 67 Stat. 589, 28 U.S.C. 1360 (Pub. Law 280), which provides (inter alia) for California state court jurisdiction over private civil litigation involving Reservation Indians (see *Bryan* v. *Itasca County*, 426 U.S. 373 (1976)), does not authorize the State to enforce its Outdoor Advertising Act on Indian Reservation land. Pet. App. 27a-28a. Neither petition seeks review of any issues regarding Public Law 280.

bility for enforcing the act's provisions upon federal lands and reservations," and thus preempted state regulation. *Id.* at 30a-31a. As further support for its preemption ruling, the court noted that Congress has granted the Secretary of the Interior authority to supervise the leasing of Indian lands, and that the Secretary has issued extensive regulations pursuant to that authority. *Id.* at 30a n.9.[11]

DISCUSSION

The decision below does not conflict with that of any federal court or other state supreme court, and does not present any issue warranting review by this Court. Accordingly, certiorari should be denied.

1. The initial question presented in the petition filed by Desert Outdoor Advertising, Inc.—whether the provisions of the HBA extend to Indian Reservations—was not considered or decided in these consolidated actions by any of the courts below and, hence, is not properly before this Court. Contrary to petitioner Desert's implications, none of the California courts in these proceedings determined whether the requirements of the HBA, itself, are applicable to federal Indian Reservations. Rather, the federal statutory issue that those courts considered was whether the HBA (most particularly, Subsection (h)) makes *state* laws regulating outdoor advertising applicable to, and enforceable on, federal Indian Reservations—a distinctly different question. Thus, the California Court of Appeal characterized the issue before it as follows (Pet. App. 54a):

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[11] In light of its resolution of the other issues, the court found it unnecessary to consider respondent's indispensable party argument. The court subsequently modified its opinion in certain respects not material here (Pet. App. 40a-41a).

> The lower court in both cases concluded the [California] Outdoor Advertising Act was applicable in its summary judgment rulings. This appeal therefore raises the issue of whether the [California] Outdoor Advertising Act applies to a non-Indian company acting pursuant to an agency agreement providing for the construction and maintenance of advertising display devices on reservation land held in trust by the United States for the beneficial use of the Morongo Band Mission Indians.

The court cast the issue entirely in terms of whether state law requirements applied; no consideration whatsoever was given to whether any restrictions were imposed by the HBA itself. Moreover, the Supreme Court of California expressly refused to decide whether the requirements of the HBA are applicable on the lands at issue. Pet. App. 21a-22a.[12]

2. Petitioner Desert also argues (Pet. 9-17) that the HBA impliedly authorizes enforcement of state statutes on federal Indian Reservations, and that respondent's posting of billboards on the Morongo Reservation is accordingly unlawful competition under California law. The Supreme Court of California correctly rejected this argument.

Where, as here, a party is carrying out an activity on federal lands pursuant to specific federal authori-

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[12] There is, accordingly, no occasion in this case to consider whether the federal statute, standing alone, creates an implied private right of action enforceable by the State or Desert in the context of this case. The courts that have considered the issue have held, correctly in our view, that the HBA does not create an implied right of action. See *National Advertising Co.* v. *City of Ashland*, 678 F.2d 106, 109 (9th Cir. 1982); *Parks* v. *Donrey, Inc.*, 596 F. Supp. 347 (W.D. Ark. 1984).

zation, state regulation prohibiting or substantially burdening such activities will be allowed only where the federal government has clearly consented to such state regulation. As this Court stated in *Hancock* v. *Train*, 426 U.S. 167, 179 (1976) (citations and footnotes omitted):

> [W]here "Congress does not affirmatively declare its instrumentalities or property subject to regulation," "the federal function must be left free" of regulation. Particular deference should be accorded that "old and well-known rule" where, as here, the rights and privileges of the Federal Government at stake not only find their origin in the Constitution, but are to be divested in favor of and subjected to regulation by a subordinate sovereign. Because of the fundamental importance of the principles shielding federal installations and activities from regulation by the States, an authorization of state regulation is found only when and to the extent there is "a clear congressional mandate," "specific congressional action" that makes this authorization of state regulation "clear and unambiguous."

Petitioner Desert discerns the required "clear and unambiguous" congressional consent to state regulation in Subsection (h) of the HBA, which states that "[a]ll public lands or reservations of the United States which are adjacent to any portion of the Interstate System and the primary system shall be controlled in accordance with the provisions of this section and the national standards promulgated by the Secretary." As the court below correctly observed, however, Subsection (h) provides only that advertising "shall be controlled", without specifying whether such control shall be exercised by federal land man-

agers or the states. In light of this inescapable ambiguity, the Supreme Court of California correctly resolved the issue in favor of exclusive federal control. Pet. App. 21a-27a.

Moreover, the legislative history of the HBA—far from dispelling this ambiguity in petitioner's favor—provides further support for the State Supreme Court's conclusion. The statutory predecessor to the HBA (Section 122 of the Federal-Aid Highway Act of 1956, ch. 462, 70 Stat. 387, as added by Section 12 of the Federal-Aid Highway Act of 1958, Pub. L. No. 85-381, 72 Stat. 95, codified by the Act of Aug. 27, 1958, Pub. L. No. 85-767, 72 Stat. 885 *et seq.* (23 U.S.C. (1959 ed.) 131)) like the present HBA, contemplated that the states, rather than the federal government directly, would generally undertake the actual task of regulating outdoor advertising along the Interstate highway system. As an exception to this general policy, however, the 1958 Act clearly indicated that Congress did not intend state regulation to extend to federal lands and Reservations. Section 12, 72 Stat. 96 (§ 122(d)) of that Act provided:

> Whenever any portion of the Interstate System is located upon or adjacent to any public lands or reservations of the United States, the Secretary of Commerce may make such arrangements and enter into such agreements with the agency having jurisdiction over such lands or reservations as may be necessary to carry out the national policy set forth in subsection (a) of this section, and any such agency is hereby authorized and directed to cooperate fully with the Secretary of Commerce in this connection.

In 1965, Congress replaced the former Section 122 with the present HBA. Like its statutory predecessor,

the HBA generally provided that the states, rather than the federal government, would directly regulate outdoor advertising. As to federal lands and Reservations, however, the new statute stated only that outdoor advertising on such properties "shall be controlled" in accordance with the provisions of the HBA and the national regulations promulgated pursuant to that statute. There is no suggestion in the legislative history of the new HBA that Congress intended to alter the established practice by which federal land managers, rather than the states, are responsible for controlling outdoor advertising on the public lands. Instead, Congress evidently intended to alter prior practice only to the extent that the substantive standards embodied in the HBA (and the national regulations promulgated thereunder by the Secretary) would henceforth be generally applicable on the federal lands without any need for prior interagency agreements. Thus, the House Report states that "[t]his section simply extends to all public lands and reservations of the United States which are adjacent to any portion of the Interstate System or the primary system the same controls covering other roads which are subject to this legislation." H.R. Rep. 1084, 89th Cong., 1st Sess. 8 (1965). If, in enacting the HBA, Congress had intended to make a significant change in the existing system by giving the states, rather than the responsible federal agency, the authority to control outdoor advertising on the federal lands, it would surely have referred to such an unusual transfer of authority, instead of merely noting, as it did, that the new provision "simply" extends the controls of the HBA to federal lands.[13]

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[13] Moreover, as the court below noted (Pet. App. 26a-27a), the enforcement scheme of the Act, which relies on the state

3. Petitioner State of California, in contrast to Desert, does not contend that the HBA authorizes it to apply its laws regulating outdoor advertising on Indian Reservation trust lands. Rather, the State apparently asserts an "inherent power" (85-615 Pet. i) to apply such laws within federal Indian Reservations that is not preempted by the HBA. Again, the court below properly rejected this contention.

This Court has clearly indicated that state laws may not be applied to activities of non-Indians on an Indian Reservation where " 'such application would interfere with Reservation self-government or would impair a right granted or reserved by federal law.' " *Rice* v. *Rehner*, 463 U.S. 713, 718 (1983), quoting *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148 (1973). Thus, while one goal of the judicial inquiry is to determine the congressional plan, the concept of tribal sovereignty is also to be given substantial weight; this Court will not necessarily apply "those standards of pre-emption that have emerged in other areas of the law." *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 143 (1980). Instead, the Court has "employed a pre-emption analysis that is informed by historical notions of tribal sovereignty," although not "determined by them." *Rice* v. *Rehner*, 463 U.S. at 718.[14]

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powers of zoning and eminent domain, is inconsistent with an intent that state laws be enforced on Indian reservation trust lands, where the states do not have such powers.

[14] Where the state attempts to exercise authority over non-Indians conducting business on the Reservation, the Reservation boundary "remains an important factor to weigh in determining whether state authority has exceeded the permissible limits." *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. at 151.

There is no definitive formula for determining whether a state may exercise authority over on-Reservation activities of non-Indians. *Ramah Navajo School Bd.* v. *Bureau of Revenue*, 458 U.S. 832, 837 (1982). Rather, the issue must be determined by a particularized examination and analysis of the various state, federal and tribal interests at stake. 458 U.S. at 838. In particular, the pervasiveness of federal regulation of the activity in question will be considered in determining whether state regulation has been preempted; the presence of an extensive federal regulatory scheme ordinarily indicates that " 'no room remains for state laws imposing additional burdens * * *.' " *Central Machinery Co.* v. *Arizona Tax Comm'n*, 448 U.S. 160, 163-164 (1980), quoting *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U.S. 685, 690 (1965).

The balance here weighs heavily against state regulation. In essence, the State maintains that it may regulate the purposes for which the Morongo, with the approval of the Department of the Interior, may lease tribal lands. The federal laws and regulations governing the leasing of Indian lands, however, are so comprehensive that "no room remains for state laws imposing additional burdens." The leasing of Indian lands has traditionally been the province of the federal government—indeed, the existence of federal restrictions upon the leasing of Indian lands has been a fundamental aspect of federal Indian law for almost 200 years. See Section 4 of the Act of July 22, 1790, ch. 33, 1 Stat. 138; Section 12 of Act of May 19, 1796, ch. 30, 1 Stat. 472. Federal law today provides for comprehensive approval authority over such leasing by the Secretary of the Interior. Thus, 25 U.S.C. 415(a) generally requires Secretarial approval for a

lease of restricted Indian lands and provides that "all leases and renewals shall be made under such terms and regulations as may be prescribed by the Secretary of the Interior." See also 25 U.S.C. 380, 393, 393a, 394, 395, 397, 402, 402a, 403, 403a, 403b, 403c, 415a, 415b, 415c, 415d, 477 and 635. Pursuant to these statutory authorizations, the Secretary of the Interior has promulgated extensive regulations governing the leasing of Indian lands. See 25 C.F.R. Pt. 162.

In short, the federal regulatory scheme concerning the leasing of restricted Indian lands is at least as comprehensive as the various federal regulatory programs concerning Indian education, trading with the Indian tribes, or logging on Indian lands, all of which this Court has determined to be so extensive as to preempt state regulation. See *Ramah Navajo School Bd.* v. *Bureau of Revenue, supra; Central Machinery Co.* v. *Arizona Tax Comm'n, supra; White Mountain Apache Tribe* v. *Bracker, supra.* Accordingly, the Supreme Court of California rightly concluded that California laws regulating outdoor advertising may not be enforced against respondent, a duly approved lessee of restricted Indian lands.[15]

4. In any event, this case does not present a question of sufficient importance to warrant review by this Court at this time. The State has made no showing, beyond unsubstantiated suggestions, that the presence of billboards on Indian reservations is a recurring and serious problem threatening the State's

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[15] Indeed, the State's contention that erection of these billboards is prohibited by state law would effectively nullify the Secretary's approval of the lease for the specific purpose of erecting them. In this context, the application of state law would not merely burden the federally approved activity, it would completely override the federal approval.

essential regulatory interests or otherwise presenting genuinely significant state concerns.[16] Indeed, the petitions fail to mention a single case beyond the Morongo Reservation where a similar problem has arisen, and we are aware of none. Nor does the decision below threaten the achievement of the policies furthered by the HBA. All leases of restricted Indian lands are subject to the approval of the Secretary of the Interior. Regardless of whether the HBA is technically applicable to Indian Reservation lands, the Secretary may take the federal policies expressed in the HBA into account when a proposed lease is submitted to him for approval, and may reject it on the ground that it is contrary to federal policy. See *Moapa Band of Paiute Indians* v. *United States Dep't of Interior*, 747 F.2d 563 (9th Cir. 1984) (upholding Interior's rejection of proposed tribal ordinance permitting brothels, on ground of general federal policy disfavoring prostitution).[17] Hence, the Secretary of the Interior can protect the interests of the general

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[16] There is absolutely no basis for petitioner Desert's suggestion (Pet. 11-13) that the Secretary of Transportation would attempt to reduce a state's share of federal highway funding for not controlling outdoor advertising on federal lands and reservations. In any event, Subsection (*l*) of the HBA provides for judicial review—necessarily including the possibility of review by this Court—of any such proposed reduction.

[17] Section 415(a) specifically requires that, before approving a lease, "the Secretary of the Interior shall first satisfy himself that adequate consideration has been given to the relationship between the use of the leased lands and the use of neighboring lands; the height, quality and safety of any structures or other facilities to be constructed on such lands; * * * and the effect on the environment of the uses to which the leased lands will be subject."

public and implement federal statutory policy in this area.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted.

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